No. 14-1146

SUPREME COURT, U.S.
FILED
AUG - 7 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
C. FREDERICK BECKNER III
KATHLEEN MORIARTY MUELLER
SIDLEY AUSTIN LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

MICHAEL J. MUELLER
EMILY BURKHARDT VICENTE
EVANGELINE C. PASCHAL
HUNTON & WILLIAMS
2200 Pennsylvania Ave., NW
Washington, D.C. 20037
(202) 955-1500

Counsel for Petitioners

SCOTT MICHELMAN*
SCOTT L. NELSON
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St., NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

ROBERT L. WIGGINS, JR.
WIGGINS, CHILDS, QUINN & PANTAZIS, LLC
301 19th Street North
Birmingham, AL 35203
(205) 314-0540

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98915
(206) 616-3167

Counsel for Respondents

PETITION FOR CERTIORARI FILED MARCH 19, 2015
CERTIORARI GRANTED JUNE 8, 2015

TABLE OF CONTENTS

Page

Volume One

United States District Court of the Northern District of Iowa, No. 5:07-cv-04009, Relevant Docket Entries 1

United States Court of Appeals, Eighth Circuit, No. 12-3753, Relevant Docket Entries 22

Original Class Action and Representative Action Complaint, *Sharp* v. *Tyson Foods, Inc.*, No. c07-4009 (N.D. Iowa Feb. 5, 2007) (redacted) 27

Plaintiffs' Motion for Rule 23 Class Certification, *Sharp* v. *Tyson Foods, Inc.*, No. c07-4009 (N.D. Iowa Jan. 29, 2008) 44

Exhibit A, Deposition of William Sager II (Jan. 4, 2008) 45

Exhibit B, Deposition of Elizabeth J. Stough (Jan. 4, 2008) 49

Exhibit 2, Declaration of Bill Haukap, to Defendant's Resistance to Plaintiffs' Motion for Conditional Certification as a Collective Action Pursuant to the Fair Labor Standards Act, *Sharp* v. *Tyson Foods, Inc.*, No. c07-4009 (N.D. Iowa Mar. 4, 2008) 51

Exhibit 11, Declaration of Ron Peters, to Defendant's Resistance to Plaintiffs' Motion for Conditional Certification as a Collective Action Pursuant to the Fair Labor Standards Act, *Sharp* v. *Tyson Foods, Inc.*, No. c07-4009 (N.D. Iowa Mar. 4, 2008) 58

Exhibit 12, Declaration of Curt Andersen, to Defendant's Resistance to Plaintiffs' Motion for Conditional Certification as a Collective Action Pursuant to the Fair Labor Standards Act, *Sharp* v. *Tyson Foods, Inc.*, No. c07-4009 (N.D. Iowa Mar. 4, 2008) 66

Exhibit 14, Declaration of Randy Story, to Defendant's Resistance to Plaintiffs' Motion for Conditional Certification as a Collective Action Pursuant to the Fair Labor Standards Act, *Sharp* v. *Tyson Foods, Inc.*, No. c07-4009 (N.D. Iowa Mar. 4, 2008) 73

Exhibit 26, Declaration of Livorio Carrillo, to Defendant's Resistance to Plaintiffs' Motion for Conditional Certification as a Collective Action Pursuant to the Fair Labor Standards Act, *Sharp* v. *Tyson Foods, Inc.*, No. c07-4009 (N.D. Iowa Mar. 4, 2008) 89

Defendant's Proposed Instructions *Bouaphakeo* v. *Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa Oct. 7, 2010) (excerpts) 92

Attachment, Jury Verdict Form, *Bouaphakeo* v. *Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa Oct. 7, 2010) 102

Defendant's Amended and Corrected Instruction No. 11, *Bouaphakeo* v. *Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa Oct. 13, 2010) 105

Defendant's Amended and Corrected Instruction No. 12, *Bouaphakeo* v. *Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa Oct. 14, 2010) 107

Order for Final Pretrial Conference, *Bouaphakeo* v. *Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa Oct. 14, 2010) 111

Parties' Joint Stipulation of Facts, *Bouaphakeo* v. *Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa) 116

Plaintiffs' Exhibit 242 (excerpt) 123

Plaintiffs' Exhibit 301 125

Plaintiffs' Exhibit 345 139

Plaintiffs' Exhibit 346 140

Plaintiffs' Exhibit 348 141

Defendant's Exhibit 2282..... 142

Transcript of Proceedings, *Bouaphakeo* v. *Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa Sept. 13-21, 2011) (excerpts)..... 144

Final Instructions to the Jury, *Bouaphakeo* v. *Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa Sept. 23, 2011)..... 468

Response to Juror Question, *Bouaphakeo* v. *Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa Sept. 23, 2011)..... 484

Verdict Form, *Bouaphakeo* v. *Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa Sept. 28, 2011)..... 486

NOTICE

The following documents have been omitted from the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 14-1146 Petition For A Writ Of Certiorari at the following pages:

Bouaphakeo v. *Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014) 1a

Bouaphakeo v. *Tyson Foods, Inc.*, No. 5:07-cv-04009 (N.D. Iowa Sept. 26, 2012) 25a

Bouaphakeo v. *Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa Aug. 25, 2011)..... 31a

Bouaphakeo v. *Tyson Foods, Inc.*, No. 5:07-cv-04009-MWB (N.D. Iowa July 14, 2008).. 39a

Bouaphakeo v. *Tyson Foods, Inc.*, 564 F. Supp. 2d 870 (N.D. Iowa 2008) 41a

Bouaphakeo v. *Tyson Foods, Inc.*, No. 12-3753 (8th Cir. Nov. 19, 2014) 114a

U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA
(WESTERN DIVISION)

Civil Docket For Case #: 5:07-cv-04009-JAJ

SHARP et al.

v.

TYSON FOODS, INC.,

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET TEXT
		* * * *
02/06/2007	2	COMPLAINT AND JURY DEMAND *Class-Action* against Tyson Foods Inc, filed by Mario Martinez, Peg Bouaphakeo, Javier Frayre, Heribento Renteria, Jesus A Montes, Jose A Garcia, Dale T Sharp, Courtney Knutson, Brian Fryar, Mike Sturtevant. Scheduling Report due by 6/19/2007 (Attachments: # 1 Civil Cover Sheet) (Smith, MacDonald) Modified on 2/7/2007 to add text as to jury demand (des,). (Entered: 02/06/2007)
		* * * *

DATE	#	DOCKET TEXT
03/31/2007	16	NOTICE by Dale T Sharp *Of Filing Additional Consents (100 Total) To Join Lawsuit Under Fair Labor Standards Act* (Attachments: # 1 Exhibit A-Consents 1-20# 2 Exhibit B-Consents 21-40# 3 Exhibit C-Consents 41-60# 4 Exhibit D-Consents 61-80# 5 Exhibit E-Consents 81-100) (McCafferty, Brian) Modified on 4/2/2007 to note that filing attny's office has been contacted regarding the redaction of personal identifiers for future filings (src). (Entered: 03/31/2007)
03/31/2007	17	NOTICE by Dale T Sharp *Of Filing Additional Consents (100 Total) To Join Fair Labor Standards Act Lawsuit* (Attachments: # 1 Exhibit A-Consents 101-120 # 2 Exhibit B-Consents 121-140 # 3 Exhibit C-Consents 141-160 # 4 Exhibit D-Consents 161-180 # 5 Exhibit E-Consents 181-200)(McCafferty, Brian) (Entered: 03/31/2007)
03/31/2007	18	NOTICE by Dale T Sharp *Of Filing Additional Consents (97 Total) To Join Fair Labor Standards Act Lawsuit* (Attachments: # 1 Exhibit A-Consents 201-220 # 2 Exhibit B-Consents 221-240 # 3 Exhibit C-Consents 241-260 # 4 Exhibit D-Consents 261-280 # 5 Exhibit E-

DATE	#	DOCKET TEXT
		Consents 281-297)(McCafferty, Brian) (Entered: 03/31/2007)
04/30/2007	19	NOTICE by Dale T Sharp *Of Filing Additional Consents (19 TOTAL) To Join Lawsuit Filed Under Fair Labor Standards Act* (Attachments: # 1 Exhibit A-Tyson Consents 298-316) (McCafferty, Brian) Modified on 5/1/2007 to note that filing attorney's office was contacted by QC Clerk regarding the redaction of personal identifiers Also Attorney Hamilton has not filed pro hac vice motion therefore he will not be added to the case although he is listed on the signature block. (src) (Entered: 04/30/2007)
		* * * *
08/03/2007	25	NOTICE by Dale T Sharp *Of Filing Additional Consents (8 TOTAL) to Join Action Under Fair Labor Standards Act* (Attachments: # 1 Exhibit A-Tyson Iowa Consents 317-324)(McCafferty, Brian) (Entered: 08/03/2007)
		* * * *
11/26/2007	28	MOTION for Protective Order (*Unopposed*) by Defendant Tyson Foods Inc. (Attachments: # 1 Exhibit A - Proposed Protective Order)(Balus, Allison) (Entered: 11/26/2007)

DATE	#	DOCKET TEXT
11/27/2007	29	ORDER granting 28 Unapposed Motion for Joint Stipulation For Protective Order. Signed by Chief Magistrate Judge Paul A Zoss on 11/27/07. (ak,) (Entered: 11/27/2007)
01/29/2008	32	MOTION for leave to file MOTIONS under Seal. Brian P McCafferty appearing for Plaintiff Dale T Sharp Motions referred to Paul A Zoss. (McCafferty, Brian) Modified on 1/30/2008 to edit text. (src) (Entered: 01/29/2008)
		* * * *
01/31/2008	33	ORDER granting 32 Motion for Leave to File Class Certification Motions Under Seal (see text of order). Signed by Judge Mark W Bennett on 01/31/08. (kfs) (Entered: 01/31/2008)
		* * * *
03/04/2008	41	MOTION to file under Seal *Defendant's Briefs and Index of Evidence* by Defendant Tyson Foods Inc (Balus, Allison) (Entered: 03/04/2008)
03/04/2008	42	ORDER Granting 41 Motion to File Defendant's Briefs and Index of Evidence Under Seal. Signed by Judge Mark W Bennett on 03/04/08. (kfs) (Entered: 03/04/2008)
		* * * *

DATE	#	DOCKET TEXT
03/11/2008	50	MOTION to file under Seal *Plaintiffs' Class Certification Reply Briefs* by Plaintiffs Mario Martinez, Peg Bouaphakeo, Javier Frayre, Heribento Renteria, Jesus A Montes, Jose A Garcia, Dale T Sharp, Courtney Knutson, Brian Fryar, Mike Sturtevant (McCafferty, Brian) (Entered: 03/11/2008)
		* * * *
03/11/2008	52	ORDER granting 50 Motion to Seal. Signed by Judge Mark W Bennett on 03/11/08. (ak) (Entered: 03/11/2008)
		* * * *
03/26/2008	58	ORDER Granting 57 SEALED MOTION To Exceed Page Limits On Class Certification Reply Briefs. All attachments will be detached and docketed pursuant to Local Rule 7(h), and filed under seal pursuant to this court's order on March 11, 2008. Dkt. # 52. Signed by Judge Mark W Bennett on 3/26/08. (src) (Entered: 03/27/2008)
		* * * *
07/03/2008	62	Memorandum Opinion and Order granting as modified 34 Sealed Motion for conditional certification as a collective action, and 35 Sealed Motion for certification as a class action (See Order Text). Signed by

DATE	#	DOCKET TEXT
		Judge Mark W Bennett on 7/03/08. (copies emailed to all attorneys) (des). (Additional attachment added on 7/14/2008: # 1 Unsealed Memorandum Opinion and Order) Please note that the unsealed version is now attached per order at docket no. 69. (src) Modified on 1/19/2012 (src). (Entered: 07/03/2008)
		* * * *
07/14/2008	69	ORDER unsealing 62 Memorandum Opinion and Order on Plaintiffs' Motions for Collective Action and Class Action Certification. Signed by Judge Mark W Bennett on 07/14/08. (src) (Entered: 07/14/2008)
07/18/2008	70	NOTICE by Peg Bouaphakeo *Of Submission Of Plaintiffs' Proposed Class Notice Pursuant to The Court's July 3, 2008 Memorandum Opinion and Order* (Attachments: # 1 Exhibit A-Proposed Class Notice) (McCafferty, Brian) (Entered: 07/18/2008)
		* * * *
08/27/2008	77	ORDER REGARDING THE ISSUANCE OF COLLECTIVE ACTION AND CLASS ACTION NOTICE RE: 70 Notice and 73 Response (see text of order). Signed by Judge Mark W Bennett on 08/27/08. (Attachment #(1) Notice) (kfs) (Entered: 08/27/2008)

DATE	#	DOCKET TEXT
		* * * *
11/06/2008	81	ORDER REASSIGNING CASE. Case reassigned to Judge John A Jarvey for all further proceedings. Judge Mark W Bennett no longer assigned to case. Signed by Judge Mark W Bennett on 11/06/08. (copy of file to JAJ) (des) Modified on 11/7/2008 to edit text. (src) (Entered: 11/06/2008)
		* * * *
02/06/2009	86	NOTICE by Peg Bouaphakeo *Of Filing Additional Consents to Join Lawsuit (100 TOTAL) Pursuant to The Fair Labor Standards Act* (Attachments: # 1 Exhibit A- Storm Lake Opt-Ins 325-344, # 2 Exhibit B- Storm Lake Opt-Ins 345-364, # 3 Exhibit C- Storm Lake Opt-Ins 365-384, # 4 Exhibit D- Storm Lake Opt-Ins 385-404, # 5 Exhibit E- Storm Lake Opt-Ins 405-424) (McCafferty, Brian) (Entered: 02/06/2009)
02/09/2009	87	NOTICE by Peg Bouaphakeo *Of Filing Additional Consents (100 TOTAL) To Join Lawsuit Pursuant to the Fair Labor Standards Act* (Attachments: # 1 Exhibit A- Storm Lake Opt-Ins 425-444, # 2 Exhibit B- Storm Lake Opt-Ins 445-464, # 3 Exhibit C- Storm Lake Opt-Ins 465-484, # 4 Exhibit D- Storm Lake Opt-Ins 485-504, # 5 Exhibit E- Storm

DATE	#	DOCKET TEXT
		Lake Opt-Ins 505-524) (McCafferty, Brian) (Entered: 02/09/2009)
		* * * *
10/06/2010	149	NOTICE by Tyson Foods Inc *of Filing Rule 23 Opt-Out Letters* (Attachments: # 1 Exhibit 1 5) (Balus, Allison) (Entered: 10/06/2010)
		* * * *
10/07/2010	151	Proposed Jury Instructions by Tyson Foods Inc. (Attachments: # 1 Jury Verdict Form) (Mueller, Michael) (Entered: 10/07/2010)
		* * * *
10/13/2010	158	Proposed Jury Instructions by Tyson Foods Inc. (Sapp, Richard) (Entered: 10/13/2010)
10/14/2010	159	Proposed Jury Instructions by Tyson Foods Inc. (Sapp, Richard) (Entered: 10/14/2010)
10/14/2010	160	NOTICE by Peg Bouaphakeo of Filing Jointly Proposed Pretrial Order (Attachments: # 1 Jointly Proposed Pretrial Order, # 2 Exhibit Plaintiffs' Objections To Defendant's Trial Exhibits, # 3 Exhibit Defendants Objections to Plaintiffs' Trial Exhibits) (Wiggins, Robert) Modified on 10/15/2010 (bib). (Entered: 10/14/2010)
		* * * *

DATE	#	DOCKET TEXT
10/19/2010	162	MOTION to Amend/Correct *Its Answer to the Complaint* by Defendant Tyson Foods Inc (Attachments: # 1 Exhibit A - Amended Answer and Affirmative Defenses) (Mueller, Michael) (Entered: 10/19/2010)
		* * * *
07/01/2011	196	MOTION re 150 MOTION in Limine *Plaintiffs Motion To Allow A Trial Deposition of Dr. Adams and Withdrawal of their Motion In Limine to Exclude Dr. Adams* by Plaintiff Peg Bouaphakeo (Wiggins, Robert) (Entered: 07/01/2011)
		* * * *
07/11/2011	202	ORDER granting 162 Defendant's Motion to Amend its Answer to the Complaint. Clerk is directed to detach, file and docket the amended answer attached to the motion. Signed by Thomas J Shields on 7/11/2011. (pac) (Entered: 07/11/2011)
07/11/2011	203	AMENDED ANSWER to 2 Complaint by Tyson Foods Inc. (Filed by Clerk per 202 Order) (pac) (Entered: 07/11/2011)
		* * * *
07/25/2011	210	REPLY BRIEF to re 196 MOTION re 150 MOTION in Limine *Plaintiffs Motion To Allow A Trial Deposition of Dr. Adams and Withdrawal of their*

DATE	#	DOCKET TEXT
		Motion In Limine to Exclude Dr. Adams filed by Peg Bouaphakeo. (Wiggins, Robert) (Entered: 07/25/2011)
		* * * *
07/27/2011	212	MOTION for Decertification of Rule 23 Class by Defendant Tyson Foods Inc (Attachments: # 1 Brief Defendant's Memorandum of Law in Support of Its Motion for Decertification of Rule 23 Class, # 2 Exhibit 1 Filed Under Seal Cover Page Only for Report of Dr. Kenneth Mericle, # 3 Exhibit 2 - Excerpts from the Deposition Transcript of Dr. Kenneth Mericle, # 4 3 - Filed Under Seal Cover Page Only for Report of Dr. Leisl M. Fox) (Mueller, Michael) (Entered: 07/27/2011)
07/27/2011	213	MOTION to file under Seal *Defendant's Unopposed Motion to File Under Seal Exhibits 1 and 3 in Support of Its Motion for Decertification of Rule 23 Class* by Defendant Tyson Foods Inc (Mueller, Michael) (Entered: 07/27/2011)
		* * * *
08/19/2011	223	MOTION for Leave to File Overlength Brief *As To Plaintiffs' Opposition To Motion To Decertify Rule 23 Class* by Plaintiff Peg Bouaphakeo (Attachments: # 1 Brief, # 2 Exhibit 1, # 3

DATE	#	DOCKET TEXT
		Exhibit 2) (Wiggins, Robert) (Entered: 08/19/2011)
		* * * *
08/24/2011		TEXT ORDER granting 213 Motion to File Exhibits Under Seal; granting 223 Motion for Leave to File Overlength Brief. Signed by Thomas J Shields on 8/24/2011. (Action taken per TJS chambers) (pac) Modified text on 8/25/2011 (pac). (Entered: 08/24/2011)
08/24/2011	225	MOTION to file under Seal *Defendant's Unopposed Motion to File Under Seal Exhibits A through C in Support of Its Reply to Plaintiffs' Opposition to Motion to Decertify Rule 23 Class* by Defendant Tyson Foods Inc (Mueller, Michael) (Entered: 08/24/2011)
08/24/2011	226	MOTION for Leave to File Overlength Brief - *Defendant's Unopposed Motion to Exceed Page Limitation of Its Reply to Plaintiffs' Opposition to Motion to Decertify Rule 23* Class by Defendant Tyson Foods Inc (Attachments: # 1 Brief Defendant's Reply to Plaintiffs' Opposition to Motion to Decertify Rule 23 Class, # 2 Exhibit A - Filed Under Seal Cover Page, # 3 Exhibit B - Filed Under Seal Cover Page, # 4 Exhibit C Filed Under Seal Cover Page, # 5 Exhibit D Lopez Jury

DATE	#	DOCKET TEXT
		Verdict Form, # 6 Exhibit E Summary of Key Testimony of Dr. Fox) (Mueller, Michael) (Entered: 08/24/2011)
08/25/2011	227	RESISTANCE to Motion re 212 MOTION for Decertification of Rule 23 Class filed by Peg Bouaphakeo. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Filed by Clerk per text order) (pac) (Entered: 08/25/2011)
08/25/2011	228	ORDER denying 212 Motion for Decertification of Rule 23 Class. Signed by Judge John A Jarvey on 8/25/2011. (Cavanagh, Maura) (Entered: 08/25/2011)
09/01/2011	229	ORDER on Final Pre-Trial Conference. (See text of order) Signed by Chief Magistrate Judge Thomas J Shields on 9/1/2011. (pac) (Entered: 09/01/2011)
		* * * *
09/01/2011	233	MOTION to Exclude Any Reference to Dr. Paul Adams, or His Opinions, at Trial by Defendant Tyson Foods Inc (Attachments: # 1 Brief Memorandum in Support, # 2 Exhibit A Fox Deposition Excerpts, # 3 Exhibit B Mericle Deposition Excerpts, # 4 Exhibit C Excerpts from 5/18/2011 Lopes v. Tyson Foods Trial Transctript, # 5 Exhibit D - Excerpts from 5/19/2011 Lopes v. Tyson Foods Trial Transcript, # 6 Exhibit E E-

DATE	#	DOCKET TEXT
		mail chain dated 6/03/2011) (Mueller, Michael) (Entered: 09/01/2011)
09/01/2011	234	*Plainiffs' Brief On Admissibility Of Defendant's Exhibits From Dr. Adams' Time Study* by Peg Bouaphakeo (Wiggins, Robert) Modified on 9/2/2011 to link to 233 (src) (Entered: 09/01/2011)
		* * * *
09/02/2011	236	TEXT ORDER granting 225 Motion to Seal Defendant's Exhibits A through C in Support of its Reply; granting 226 Motion for Leave to File Overlength Brief. The Clerk is directed to detach and separately file Defendant's brief and its attachments. Signed by Chief Magistrate Judge Thomas J Shields on 9/2/2011. (Action taken per TJS chambers) (pac) (Entered: 09/02/2011)
09/02/2011	237	REPLY BRIEF re 212 MOTION for Decertification of Rule 23 Class filed by Tyson Foods Inc. (Attachments: # 1. Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E) (Filed by Clerk per 236 Order) (pac) (Entered: 09/02/2011)
09/02/2011	238	TEXT MINUTE Entry for proceedings held before Judge John A Jarvey: Final Pretrial Conference held on 08/25/2011. Docketed by Clerk

DATE	#	DOCKET TEXT
		pursuant to direction from JAJ chambers. (src) (Entered: 09/02/2011)
		* * * *
09/21/2011	270	MOTION for Judgment as a Matter of Law *and Motion to Decertify* by Defendant Tyson Foods Inc Responses due by 10/11/2011 (Attachments: # 1 Brief, # 2 Exhibit A Garcia v. Tyson Foods, # 3 Exhibit B Lugo v. Farmer's Pride) (Mueller, Michael) (Entered: 09/21/2011)
09/22/2011	271	BRIEF in Opposition re 270 MOTION for Judgment as a Matter of Law *and Motion to Decertify (Brief Addresses Meal Break Portion of the Motion)* filed by Peg Bouaphakeo. (McCafferty, Brian) (Entered: 09/22/2011)
09/22/2011	272	RESISTANCE to Motion re 270 MOTION for Judgment as a Matter of Law *and Motion to Decertify (Resistance is Specifically to Defendant's Motion to Decertify)* filed by Peg Bouaphakeo. (McCafferty, Brian) (Entered: 09/22/2011)
09/23/2011	273	MOTION for Judgment as a Matter of Law *Pursuant to Rule 50* by Plaintiff Peg Bouaphakeo Responses due by 10/11/2011 (McCafferty, Brian) (Additional attachment(s) added on 9/26/2011: # 1 Brief in Support) (pac). (Entered: 09/23/2011)

DATE	#	DOCKET TEXT
09/23/2011	274	*THIS HAS BEEN ATTACHED TO THE MOTION AT 273* Brief in Support re 273 MOTION for Judgment as a Matter of Law *Pursuant to Rule 50* filed by Peg Bouaphakeo. (McCafferty, Brian) Modified on 9/26/2011 to attach to motion (pac). (Entered: 09/23/2011)
		* * * *
09/26/2011	277	Final Jury Instructions signed by Judge Judge John A Jarvey on 9/23/2011. (Cavanagh, Maura) (Entered: 09/26/2011)
		* * * *
09/26/2011	280	JURY VERDICT in favor of Plaintiffs Peg Bouaphakeo, Mario Martinez, Javier Frayre, Heribento Renteria, Jesus A. Montes, and Jose A. Garcia, individually and on behalf of others similarly situated against Defendant, Tyson Foods, Inc. (Attachments: # 1 Unredacted Verdict) (djs) (Entered: 09/26/2011)
09/26/2011	281	JUDGMENT in favor of Plaintiffs, Brian Fryar, Courtney Knutson, Dale T Sharp, Heribento Renteria, Javier Frayre, Jesus A Montes, Jose A Garcia, Mario Martinez, Mike Sturtevant, Peg Bouaphakeo against Defendant, Tyson Foods Inc, in the amount of Two Million Eight Hundred Ninety-Two Thousand, Three Hundred

DATE	#	DOCKET TEXT
		Seventy-Eight Dollars and Seventy Cents ($2,892,378.70). Signed by Clerk on 9/26/11. (djs) (Entered: 09/26/2011)
09/26/2011	282	MOTION to Include Liquidated Damages in Final Judgment by Plaintiff Peg Bouaphakeo (Wiggins, Robert) Modified text on 9/27/2011 (pac). (Entered: 09/26/2011)
		* * * *
09/27/2011	294	JURY QUESTION to the Court and COURT'S ANSWER to the jury. (Cavanagh, Maura) (Entered: 09/27/2011)
		* * * *
09/27/2011	297	Witness and Exhibit List in case Sharp et al v. Tyson Foods Inc. (Attachments: # 1 Pl's Ex P-15, # 2 Pl's Ex P-23, # 3 Pl's Ex P-25, # 4 Pl's Ex P-45, # 5 Pl's Ex P-52, # 6 Pl's Ex P-66, # 7 Pl's Ex P-71, # 8 Pl's Ex P-77, # 9 Pl's Ex P-86, # 10 Pl's Ex P-88, # 11 Pl's Ex P-90, # 12 Pl's Ex P-92, # 13 Pl's Ex P-129, # 14 Pl's Ex P-145, # 15 Pl's Ex P-146, # 16 Pl's Ex P-153, # 17 Pl's Ex P-155, # 18 Pl's Ex P-166, # 19 Pl's Ex P-170, # 20 Pl's Ex P-173, # 21 Pl's Ex P-174, # 22 Pl's Ex P-205, # 23 Pl's Ex P-219, # 24 Pl's Ex P-222, # 25 Pl's Ex P-223, # 26 Pl's Ex P-224, # 27 Pl's Ex P-226, # 28 Pl's Ex P-227, # 29 Pl's Ex P-228, # 30 Pl's Ex P-230,

DATE	#	DOCKET TEXT
		# 31 Pl's Ex P-232, # 32 Pl's Ex P-233, # 33 Pl's Ex P-237, # 34 Pl's Ex P-239 (236), # 35 Pl's Ex P-242, # 36 Pl's Ex P-287, # 37 Pl's Ex P-288, # 38 Pl's Ex P-301, # 39 Pl's Ex P-316, # 40 Pl's Ex P-317, # 41 Pl's Ex P-320, # 42 Pl's Ex P-344, # 43 Pl's Ex P-345, # 44 Pl's Ex P-346, # 45 Pl's Ex P-348, # 46 Pl's Ex P-349 (thumb drive housed in clerk's office), # 47 Pl's Ex P-350, # 48 Def's Ex D-2013, # 49 Def's Ex D-2015, # 50 Def's Ex D-2023, # 51 Def's Ex D-2024, # 52 Def's Ex D-2033, # 53 Def's Ex D-2082, D-2089, D-2090, D-2092, D-2093, D-2104, D-2106, D-2117, D-2120, D-2123, D-2126, D-2127, D-2181, D-2182, D-2183, D-2184, D-2185, D-2187, D-2188, D-2189, D-2191, D-2192, D-2233-1, D-2233-2, D-2233-4, D-2233-5, D-2233-6, D-2233-7, D-2233-8, D-2241, D-2249, D-2250, D-2251, D-2252, D-2255, D-2256 (housed in clerk's office), # 54 Def's Ex D-2232-01, # 55 Def's Ex D-2232-06, # 56 Def's Ex D-2232-07, # 57 Def's Ex D-2232-12, # 58 Def's Ex D-2232-14, # 59 Def's Ex D-2232-17, # 60 Def's Ex D-2232-18, # 61 Def's Ex D-2232-19, # 62 Def's Ex D-2232-21, # 63 Def's Ex D-2232-35, # 64 Def's Ex D-2232-37, # 65 Def's Ex D-2232-39, # 66 Def's Ex D-2232-41, # 67 Def's Ex D-2232-42, # 68 Def's Ex D-2232-43, # 69 Def's Ex D-2232-44, # 70 Def's Ex D-2232-45,

DATE	#	DOCKET TEXT
		# 71 Def's Ex D-2232-48, # 72 Def's Ex D-2232-50, # 73 Def's Ex D-2253, # 74 Def's Ex D-2270, # 75 Def's Ex D-2271, # 76 Def's Ex D-2272, # 77 Def's Ex D-2273, # 78 Def's Ex D-2274, # 79 Def's Ex D-2280, # 80 Def's Ex D-2281, # 81 Def's Ex D-2282, # 82 Def's Ex D-2282, # 83 Def's Ex D-2290, # 84 Def's Ex D-2295, # 85 Def's Ex D-2300, # 86 Def's Ex D-2301, # 87 Def's Ex D-2302) (djs) (Entered: 09/27/2011)
09/27/2011	298	NOTICE of Filing of Electronic Transcript: Administrative Order attached: Please read for instructions for actions parties/counsel may be required to take re 283 Trial Day 1 Transcript, 284 Trial Day 2 Transcript, 285 Trial Day 3 Transcript, 286 Trial Day 4 Transcript, 287 Trial Day 5 Transcript, 288 Trial Day 6 Transcript, 289 Transcript of Proceedings, 290 Trial Day 7 Transcript, 291 Trial Day 8 Transcript, 292 Trial Day 9 Transcript and 293 Transcript of Proceedings: Jury Question and Jury Verdict. (pac) (Entered: 09/27/2011)
09/27/2011	299	RESPONSE by Tyson Foods Inc re 273 MOTION for Judgment as a Matter of Law *Pursuant to Rule 50* (Attachments: # 1 Exhibit A – Garcia

DATE	#	DOCKET TEXT
		v. Tyson Foods, Inc., Summary Judgment Opinion) (Mueller, Michael) Modified text on 9/28/2011 (pac). (Entered: 09/27/2011)
		* * * *
10/24/2011	305	MOTION for Directed Verdict *(Defendant's Renewed Motion for Judgment as a Matter of Law and Motion to Decertify or, in the Alternative, for a New Trial on Damages)* by Defendant Tyson Foods Inc Responses due by 11/10/2011 (Mueller, Michael) (Entered: 10/24/2011)
		* * * *
11/15/2011	310	RESISTANCE to 305 MOTION for Directed Verdict *(Defendant's Renewed Motion for Judgment as a Matter of Law and Motion to Decerti or, in the Alternative, for a New Trial on Damages)* filed by Peg Bouaphakeo. (Filed by Clerk per 309 Text Order) (pac) (Entered: 11/15/2011)
		* * * *
12/01/2011	313	REPLY BRIEF to 305 MOTION for Directed Verdict *(Defendant's Renewed Motion for Judgment as a Matter of Law and Motion to Decertify or, in the Alternative, for a New Trial on Damages)* by Tyson Foods Inc. (Filed

DATE	#	DOCKET TEXT
		by Clerk per 312 Text Order) (pac) Modified on 12/1/2011
		* * * *
01/13/2012	315	NOTICE of Supplemental Authority in Support of 305 Renewed Motion for Judgment as a Matter of Law and Motion to Decertify by Tyson Foods Inc. (Mueller, Michael) Modified on 1/17/2012 to add link (pac). (Entered: 01/13/2012)
09/26/2012	316	ORDER denying 305 Motion for Directed Verdict. Signed by Judge John A Jarvey on 09/26/2012. (Cavanagh, Maura) (Entered: 09/26/2012)
		* * * *
11/08/2012	329	ORDER GRANTING re 282 MOTION to Include Liquidated Damages in Final Judgment filed by Peg Bouaphakeo Signed by Judge John A Jarvey on 11/08/2012. (Cavanagh, Maura) (Entered: 11/08/2012)
11/09/2012	330	AMENDED JUDGMENT in favor of Brian Fryar, Courtney Knutson, Dale T Sharp, Heribento Renteria, Javier Frayre, Jesus A Montes, Jose A Garcia, Mario Martinez, Mike Sturtevant, Peg Bouaphakeo against Tyson Foods Inc in the amount of $5,785,757.40. Signed by Clerk on 11/9/2012. (pac) (Entered: 11/09/2012)

DATE	#	DOCKET TEXT
		* * * *
11/16/2012	334	NOTICE of Appeal re 330 Amended Judgment by Tyson Foods Inc. Filing fee $ 455, receipt number 0862-1504727. (Attachments: # 1 Exhibit Appelllant's Form A) (Mueller, Michael) Modified to add link on 11/19/2012 (skm). (Entered: 11/16/2012)
		* * * *

U.S. COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

12-3753

PEG BOUAPHAKEO, et al

v.

TYSON FOODS, INC,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/19/2012	Civil case docketed. [3976201] [12-3753] (PSA)
	* * * *
02/13/2013	RECORD FILED APLNT/PET APPENDIX, 5 volumes, Location STL, 1 box, Comments: 3 copies [4005274] [12-3753] (MER)
02/14/2013	BRIEF FILED APPELLANT BRIEF filed by Tyson Foods. w/service 02/13/2013, Length: 11,938 words
	10 COPIES OF PAPER BRIEFS FROM Tyson Foods due 02/19/2013 WITH revised certificate of service for paper briefs.
	Brief of Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Mario

DATE	PROCEEDINGS
	Martinez, Jesus A. Montes and Heribento Renteria due on 03/18/2013 [4005057] [12-3753] (MER)
02/14/2013	ADDENDUM of APPELLANT FILED by Appellant Tyson Foods. w/service 02/08/2013 [4005061][12-3753] (MER)
	* * * *
04/19/2013	RECORD FILED APLEE/RES APPENDIX, 1 volume, Location STL, Comments: 3 copies [4028831] [12-3753] (MER)
	* * * *
04/30/2013	ADDENDUM of APPELLEE FILED by Appellees Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Mario Martinez, Jesus A. Montes and Heribento Renteria, w/service 04/29/2013 [4030 675] [12¬3753] (MER)
04/30/2013	BRIEF FILED APPELLEE BRIEF filed by Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Mario Martinez, Jesus A. Montes and Heribento Renteria, w/service 04/29/2013, Length: 13,996 words
	10 COPIES OF PAPER BRIEFS FROM Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Mario Martinez, Jesus A. Montes and Heribento Renteria due 05/06/2013 WITH revised certificate of service for paper briefs. Reply brief of Tyson Foods

DATE	PROCEEDINGS
	due on 05/14/2013. [4030685] [12-3753] (MER)
	* * * *
06/05/2013	BRIEF FILED - APPELLANT REPLY BRIEF filed by Tyson Foods. w/service 06/04/2013, Length 6,948 words
	10 COPIES OF PAPER BRIEFS FROM Tyson Foods due 06/10/2013 WITH revised certificate of service for paper briefs [4042305] [12-3753] (MER)
	* * * *
02/11/2014	ARGUED & SUBMITTED in St. Paul to Judges Lavenski R. Smith, C. Arlen Beam, Duane Benton on 02/11/2014 Mr. Michael J. Mueller for Appellant Tyson Foods and Mr. Robert L. Wiggins, Jr. for Appellees Mario Martinez, Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Jesus A. Montes and Heribento Renteria. Rebuttal by Mr. Michael J. Mueller for Tyson Foods RECORDED [4122794] [12-3753] (JMM)
08/25/2014	OPINION FILED THE COURT: Lavenski R. Smith, C. Arlen Beam and Duane Benton AUTHORING JUDGE: Duane Benton (PUBLISHED), DISSENT BY: C. Arlen Beam [4189089] [12-3753] (MDS)

DATE	PROCEEDINGS
08/25/2014	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. LAVENSKI R. SMITH, C. ARLEN BEAM and DUANE BENTON Hrg Feb 2014 [4189102] [12-3753] (MDS)
	* * * *
09/22/2014	PETITION for enbanc rehearing and also for rehearing by panel filed by Appellant Tyson Foods w/service 09/22/2014 [4198917] [12-3753] (TW)
09/25/2014	JUDGE ORDER: A petition for rehearing has been filed by the Appellant in the above case. The court requests a response to the petition. The response is limited to fifteen pages and should be filed electronically. Response due on 10/06/2014 by Appellees Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Mario Martinez, Jesus A. Montes and Heribento Renteria. [4200253] [12-3753] (MDS)
	* * * *
10/09/2014	RESPONSE in opposition to petition for enbanc rehearing [4198917-2], petition for rehearing by panel [4198917-3] filed by Attorney Mr. Robert L. Wiggins, Jr. for Appellees Mario Martinez, Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Jesus A. Montes and Heribento Renteria,

DATE	PROCEEDINGS
	w/service 10/09/2014. [4205231] [12-3753] (RLW)
	* * * *
11/19/2014	JUDGE ORDER: The petition for rehearing en banc is denied. The petition for panel rehearing is also denied. Chief Judge Riley, Judge Wollman, Judge Loken, Judge Gruender, and Judge Shepherd would grant the petition for rehearing en banc. Judge Beam would grant panel rehearing. Judge Beam dissented to the denial of rehearing by the panel. Judge Benton wrote separately. [4198917-2] [4198917-3] PUBLISHED ORDER. [4217916] [12-3753] (MER)
	* * * *
12/03/2014	MANDATE ISSUED. [4221960] [12-3753] (MDS)
	* * * *
06/08/2015	SUPREME COURT order filed granting cert petition. Order filed on 06/08/2015 in case No. 14-1146. [4283 235] [12-3753] (SRD)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION-SIOUX CITY

[Filed: 02/06/07]

Docket No. c07-4009 MWB

DALE T. SHARP, COURTNEY KNUTSON, BRIAN FRYAR, MIKE STURTEVANT, MARIO MARTINEZ, PEG BOUAPHAKEO, JAVIER FRAYRE, HERIBENTO RENTERIA, JESUS A. MONTES, and JOSE A. GARCIA on behalf of themselves and all other similarly situated individuals,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

Complaint-Class Action

JURY TRIAL DEMANDED

ORIGINAL CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT

Plaintiffs, by and through their undersigned counsel, on behalf of themselves and other similarly situated individuals either currently or formerly employed by Defendant Tyson Foods, Inc. (hereafter referred to as "Tyson"), at its meat processing facilities in Denison, Iowa and Storm Lake, Iowa, for their Class Action and

Representative Action Complaint against Tyson allege, upon information and belief, except as to the allegations that pertain to the named Plaintiffs and their counsel, which are based upon personal knowledge, as follows:

I. INTRODUCTION

1. This is a class action brought pursuant to Federal Rule of Civil Procedure 23 by Plaintiffs on behalf of themselves and all other similarly situated current and former production and support employees of Defendant Tyson's meat processing facilities in Denison, Iowa and Storm Lake, Iowa for the purpose of obtaining relief under Iowa law for, *inter alia*, unpaid wages and unpaid overtime wages.

2. The named Plaintiffs also bring a representative action against Tyson under federal law pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq., on behalf of themselves and all other similarly situated current and former production and support employees of Defendant Tyson's meat processing facilities in Denison, Iowa and Storm Lake, Iowa for unpaid wages and unpaid overtime wages, liquidated damages, costs, attorneys' fees, and declaratory and injunctive relief.

3. At all times relevant to this Complaint, Plaintiffs have worked at Tyson's meat processing facilities located in Denison, Iowa and Storm Lake, Iowa.

4. During the class period in this case, Tyson has failed to pay Plaintiffs their minimum hourly rate of pay for all hours of work they performed in addition to overtime as required by federal law. The uncompensated time includes, hut is not limited to, time spent preparing, donning, doffing, obtaining and sanitizing sanitary and safety equipment and clothing, obtaining

tools, equipment and supplies necessary for the performance of their work, "working" steels and all other activities in connection with these job functions, and walking between work sites after the first compensable work activity and before the last compensable work activity. These unpaid work activities took place before and after paid time, and during both paid breaks and unpaid lunch breaks.

5. At all times relevant to this Complaint, upon information and belief, Defendant Tyson has only paid certain "mesh wearing" employees at its Denison, Iowa and Storm Lake, Iowa meat processing facilities four (4) minutes per day for "clothes changing" time, despite the fact that Plaintiffs spend as much as 30-35 minutes or more per day performing uncompensated work activities as described in this Complaint.

II. JURISDICTION AND VENUE

6. This Court has jurisdiction over Plaintiffs' federal claims because they are brought pursuant to the Fair Labor Standards Act, 29 U.S.C. 216 (b), and because they raise a federal question pursuant to 28 U.S.C. § 1331. This Court also has jurisdiction in this matter over Plaintiffs' state law class claims pursuant to 28 U.S.C. § 1332(d) since the matter is a class action in which the aggregate claims of the individual class members exceeds the sum or value of $5,000,000 exclusive of interest and costs and Defendant Tyson is a citizen of the State of Delaware as defined by 28 U.S.C. 1332(c), since Tyson Foods, Inc. is a Delaware corporation whose principal place of business is in Springdale, Arkansas.

7. Venue is proper in this federal judicial district pursuant to 28 U.S.C. 1391(a) and (c), because a substantial part of the events or omissions giving rise to

these claims occurred within this judicial district, and because Defendant Tyson resides in this judicial district in that it regularly conducts business within this judicial district and thus is subject to personal jurisdiction within this judicial district.

III. PARTIES

8. Plaintiff Dale T. Sharp is a current Tyson employee at the Denison, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Sharp presently resides at *** Denison, IA 51442.

9. Plaintiff Courtney Knutson is a current Tyson employee at the Denison, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Knutson presently resides at *** Deloft, IA 51441.

10. Plaintiff Brian Fryar is a former Tyson employee at the Denison, Iowa meat processing facility who was employed during the relevant class period in this case and left Tyson in or around November 2005. Plaintiff Fryar presently resides at *** Denison, IA 51442.

11. Plaintiff Mike Sturtevant is a former Tyson employee at the Denison, Iowa meat processing facility who was employed during the relevant class period in this case and left Tyson in or around July 2005. Plaintiff Sturtevant presently resides at *** Denison, IA 51442.

12. Plaintiff Mario Martinez is a former Tyson employee at the Storm Lake, Iowa meat processing facility who was employed during the relevant class period in this case and left Tyson in or around February 2006. Plaintiff Martinez presently resides at *** Storm Lake, IA 50588.

13. Plaintiff Peg Bouaphakeo is a current Tyson employee at the Storm Lake, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Bouaphakeo presently resides at *** Storm Lake, IA 50588.

14. Plaintiff Javier Frayre is a current Tyson employee at the Storm Lake, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Frayre presently resides at *** Storm Lake, IA 50588.

15. Plaintiff Heribento Renteria is a current Tyson employee at the Storm Lake, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Renteria presently resides at *** Storm Lake, IA 50588.

16. Plaintiff Jesus A. Montes is a current Tyson employee at the Storm Lake, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Montes presently resides at *** Storm Lake, IA 50588.

17. Plaintiff Jose A. Garcia is a current Tyson employee at the Storm Lake, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Montes presently resides at *** Storm Lake, IA 50588.

18. Plaintiffs bring this class action for their state law claims on behalf of themselves and all other similarly situated current and former production and support employees of Defendant Tyson's meat processing facilities located in Denison, Iowa and Storm Lake, Iowa ("Class members"). Moreover, the named Plaintiffs assert federal claims under the Fair Labor Standards Act as a representative action pursuant to 29 U.S.C.

§ 216(b), on behalf of themselves and all other similarly situated current and former employees who work or worked at Tyson's meat processing facilities located in Denison, Iowa and Storm Lake, Iowa.

19. Defendant Tyson Foods, Inc. is a Delaware corporation that operates numerous meat processing facilities throughout the United States including facilities in Denison, Iowa (located in Crawford County) and Storm Lake, Iowa (located in Buena Vista County). Defendant Tyson is a corporation engaged in interstate commerce and in the production of goods for commerce throughout the United States. Defendant Tyson can be served with original service of process through its agent for service, CT Corporation System, 1515 Market Street, 12th Floor, Philadelphia, PA 19102.

IV. CLASS ACTION ALLEGATIONS

20. The Named Plaintiffs are individuals who are currently, or were within the applicable period of limitations prior to the commencement of this action, employed by Defendant Tyson at its meat processing facilities in Denison, Iowa and Storm Lake, Iowa. This matter is maintainable as a class action pursuant to Federal Rule of Civil Procedure 23(a), Rule 23(b)(1)(A) and (B), and Rule 23(b)(3), on behalf of a Class consisting of: current and former production and support employees of the Tyson meat processing facilities in Denison, Iowa and Storm Lake, Iowa (the "Class").

21. Plaintiffs believe that there are at least 3500 present and former production and support employees in the Class during the relevant Class period of February 6, 2005 to the present.

22. Given the size of the facilities involved and the systematic nature of Defendant Tyson's failure to comply with Iowa statutory law, the members of the Class are so numerous that joinder of all members is impractical.

23. The Named Plaintiffs' claims are typical of the claims of the Class members because they are or were hourly production and support workers who, like the Class members, sustained damages arising out of Defendant Tyson's unlawful compensation system as described in more detail herein.

24. Plaintiffs will fairly and adequately protect the interests of the Class members. Plaintiffs have retained counsel competent and experienced in complex class action wage and hour litigation.

25. Common questions of law and fact exist as to all Class members and predominate over any questions solely affecting individual Class members. Among the questions of law and fact common to Plaintiffs and the Class are:

a. Whether the work performed by Plaintiffs and the Class is included in the type of work Defendant Tyson employed Plaintiffs and the Class to perform;

b. Whether the work performed by Plaintiffs and the Class is compensable under federal law and/or Iowa state law;

c. Whether Defendant Tyson has engaged in a pattern and/or practice in Iowa of forcing, coercing, deceiving and/or permitting Plaintiffs and the Class to perform work for Defendant Tyson's benefit which was not properly compensated;

d. Whether Defendant Tyson has failed to permit full meal and rest periods as required by Iowa law, other applicable regulations, and/or Defendant Tyson's stated policies;

e. Whether Defendant Tyson has failed to properly compensate Plaintiffs and the Class in connection with interruptions to their meal or rest periods;

f. Whether Defendant Tyson has failed to keep true and accurate time records for all hours worked by its employees as required by Tyson's policies and federal and state law;

g. Whether Defendant Tyson failed to pay Plaintiffs and the Class for all of the work Tyson required them to perform;

h. Whether Defendant Tyson violated the Iowa Wage Payment Collection Law, Iowa Code 91A.1 et seq. through its practices of not paying employees for all time worked;

i. Whether Defendant Tyson failed to pay employees for time spent walking between work stations after the first compensable work activity and before the last compensable work activity in violation of both the federal Fair Labor Standards Act and the Iowa Wage Payment Collection Law; and

j. The nature and extent of class-wide injury and the measure of damages for the injury.

26. Class action treatment is superior to the alternatives for the fair and efficient adjudication of the controversy alleged herein. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously,

efficiently, and without the duplication of effort and expense that numerous individual actions would entail. No difficulties are likely to he encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy. The Class is readily identifiable from the Defendant Tyson's own employment records.

27. Prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendant Tyson.

28. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impractical. Furthermore, the amounts at stake for many of the Class members, while substantial, are not great enough to enable them to maintain separate suits against Tyson.

29. Without a class action, Defendant Tyson will likely retain the benefit of their wrongdoing and will continue an illegal course of action, which will result in further damages to Plaintiffs and the Class Plaintiffs envision no difficulty in the management of this action as a class action.

V. REPRESENTATIVE ACTION ALLEGATIONS

30. Defendant Tyson owns and operates meat processing facilities in Denison, Iowa and Storm Lake, Iowa. The complained of unlawful compensation system at issue in this Complaint has affected Defendant Tyson's present and former production and support employees uniformly at these locations. At all times

relevant to this Complaint, Defendant Tyson has utilized the same compensation system complained about herein.

31. Under Defendant Tyson's wage compensation system, Plaintiffs and Class members who are production employees are paid only during the time that they are present on the actual production assembly line under a system known as "gang time" or "line time." Defendant Tyson, with the exception of the payment to some employees of four minutes per day for "clothes changing time," as a matter of policy and practice, does not pay its employees for all required pre-production line and post-production line activities that are necessary and integral to their overall employment responsibilities, such as: donning and doffing clothing and protective equipment, cleaning and sanitizing that equipment, walking to their lockers and/or production line after already performing compensable activities, and at the end of the work day, walking to the wash stations and then to their lockers and/or supply rooms before the end of compensable time, working on knife maintenance equipment known as "steels" or "mousetraps", and waiting in line to receive required knives, supplies, tools and equipment needed for production line activities. Defendant Tyson also requires its employees to be present at the production line for periods after their "gang time" (i.e. the time when they stop getting paid) but they are not paid for that time.

32. Pursuant to federal regulations and Defendant Tyson's own internal policies and procedures, Plaintiffs and Class members are required to wear uniforms and special personal protective equipment ("PPE") for protection and sanitary reasons. Uniforms include shirts, pants and boots. PPE includes, *inter alia*, plastic aprons, belly guards, wrist guards, mesh sleeves, sheaths,

gloves, mesh gloves, mesh aprons, hardhats, scabbards, hairnets, earplugs, coveralls, eye protection, and other protective equipment and coverings. Most of Defendant Tyson's employees use knives and other sharp instruments in the course of their work and the PPE is designed to protect them from injury. The PPE and other required gear are also designed to protect Tyson's meat products from contamination by food borne diseases.

33. As a consequence of the compensation system utilized by Defendant Tyson, Plaintiffs and Class members are not fully paid at the beginning of each shift for the time it takes to don uniforms, obtain gear, maintain gear, walk from the supply rooms to their lockers and/or from their lockers to sanitation stations and then to production areas, and sanitize the required PPE, walk to production areas and don PPE.

34. At the beginning of each work day, Plaintiffs and Class members are required to report to their lockers to don their uniforms. Production employees must also obtain their PPE, walk to storage areas and obtain knives and other gear, work their steels and/or mousetraps, walk to the sanitation stations and sanitize their gear, walk to the production lines and don the PPE *before* paid time begins. Other than a total of four (4) minutes per day of "clothes changing" time, Plaintiffs are not paid for these work activities.

35. Pursuant to Defendant Tyson's compensation system, employees are not fully compensated for time spent before or after paid time working steels or mousetraps, which is a necessary task for the performance of their job.

36. During their unpaid lunch and other paid or unpaid breaks, Plaintiffs and Class members have to remove their PPE, clean their PPE, and then re-don it

at the end of breaks. These employees are not paid anything or are not fully paid for performing these work activities.

37. After the end of paid time, employees must finish their work on production and other activities, walk to wash stations, wait in line to wash the PPE, knives and other gear, wash their PPE, knives and gear, walk to their lockers, doff their uniforms and PPE and stow the uniforms, PPE, knives and other gear in their lockers.

38. According to Defendant Tyson's compensation system, Plaintiffs and Class Members are not paid during the time after "gang time" (when compensation stops) although they continue to work on final production tasks and then walk to and wait at wash areas, doff PPE, wash PPE and gear (as well as their own bodies), walk to lockers, doff uniforms and stow gear and uniforms.

39. As a result of Defendant Tyson's compensation system, and other practices and policies followed by Tyson, Plaintiffs and Class members are not paid for all of the time that they work presently (other than the four minutes per day "clothes changing" which Tyson purports that it pays) and they have not been paid for all of the time they have worked for several years.

40. Plaintiffs and all Class members are similarly situated individuals who worked at and/or continue to work at Defendant Tyson's meat processing facilities in Denison, Iowa and Storm Lake, Iowa and who were and/or continue to be deprived of their lawful wages under federal and Iowa state law in the same manner.

41. The facts and circumstances relating to Defendant Tyson's compensation system vis-à-vis production time and employment-related activities prior to paid

production time and after paid production time present common questions of law and fact pursuant to Fed.R.Civ.P. 23.

42. Defendant Tyson's failure to pay Plaintiffs and Class members their lawful wages was and is willful. Defendant Tyson knew or should have known that its conduct was unlawful and/or showed reckless disregard for the matter of whether its above-described conduct was prohibited by law. Defendant Tyson does not have written authorization from any Plaintiff or class member to withhold, divert or deduct any portion of Plaintiffs' and class members' wages that arc at issue in this Complaint.

43. Despite its knowledge that time spent by Plaintiffs and Class members, as described above, was compensable time under both state and federal law, Defendant Tyson has refused to fully compensate workers at their Dennison, Iowa and Storm Lake, Iowa facilities for any of this time.

V. CAUSES OF ACTION

COUNT I

VIOLATION OF THE FAIR LABOR STANDARDS ACT

29 U.S.C. § 201 et seq.

All Plaintiffs v. Defendant Tyson

44. Plaintiffs re-allege and incorporate the preceding paragraphs as if fully set forth herein.

45. Pursuant to the Fair Labor Standards Act, specifically 29 U.S.C. § 207, Defendant Tyson was and is obligated to pay employees at a rate equal to one and one-half times their normal hourly rate of pay for all

time spent performing compensable work in excess of 40 hours per week.

46. Pursuant to the Fair Labor Standards Act, specifically 29 U.S.C. § 216(b), Defendant Tyson, because it failed to pay employees the required amount of overtime at the statutory rate, must reimburse the employees not only for the unpaid overtime wages, but also for liquidated damages in an amount equal to the amount of unpaid overtime wages. Plaintiffs assert that the Defendant Tyson's refusal to pay for time worked was willful.

47. Pursuant to the Fair Labor Standards Act, 29 U.S.C. § 216(b), Plaintiffs are entitled to reimbursement of the costs and attorneys' fees expended if they are successful in prosecuting an action for unpaid overtime wages.

WHEREFORE, Plaintiffs pray for the following relief against Defendant Tyson:

A. That this Court permits this action to go forward as a representative action pursuant to 28 U.S.C. § 216(b) and approves notice of this action to all other similarly situated at Tyson's Denison, Iowa and Storm Lake, Iowa facilities.

B. That this Court Order an accounting of lost wages for Plaintiffs;

C. That this Court enjoin Defendant Tyson from continuing to commit unlawful practices related to wages; and

D. That this Court award lost overtime wages, liquidated damages, statutory penalties, interest, costs and attorney's fees.

COUNT II

Violation of The Iowa Wage Payment Collection Law

Iowa Code 91A.1 et seq.

All Class Members v. Defendant Tyson

48. Plaintiffs re-allege and incorporate the preceding paragraphs as if fully set forth herein.

49. Upon information and belief, the Class period for this cause of action is at least February 6, 2005 to the present.

50. Pursuant to the Iowa Wage Payment Collection Law, Iowa Code 91A.1 et seq., Defendant Tyson is required to pay all wages owed to its employees.

51. Defendant Tyson has intentionally refused to pay all wages due as set forth in the preceding paragraphs of this Complaint to Plaintiffs and class members in violation of the Iowa Wage Payment Collection Law, Iowa Code 91A.1 et seq.

52. Defendant Tyson is not permitted by state or federal law to withhold or divert any portion of Plaintiffs' and class members' wages that arc at issue in this Complaint.

53. Defendant Tyson does not have written authorization from any Plaintiff or class member to withhold, divert or deduct any portion of Plaintiffs' and class members' wages that are at issue in this Complaint.

54. Pursuant to the Iowa Wage Payment Collection Law, Iowa Code 91A.1 et seq., and specifically Iowa Code 91A.8, employers such as Defendant Tyson who intentionally fail or refuse to pay an employee wages in conformance with the statute shall be liable to the employee for any wages or expenses that were not paid, plus liquidated damages, court costs and usual

and necessary attorneys fees incurred in recovering the unpaid wages or expenses.

55. Defendant Tyson has violated Iowa state law by failing to pay Plaintiffs and class members for all compensable time and by failing to pay Plaintiffs and class members for all work time, including overtime, at the established rate.

WHEREFORE, Plaintiffs and all others similarly situated pray for the following relief against Defendant Tyson:

A. That this Court enter an Order certifying this action as a class action pursuant to Federal Rule of Civil Procedure 23;

B. That this Court Order an accounting of lost wages for Plaintiffs and all others similarly situated;

C. That this Court enjoin Defendant Tyson from continuing to commit unlawful practices related to wages; and

D. That this Court award lost wages, lost overtime wages, interest, costs and attorney's fees.

Respectfully submitted,

/s/ MacDonald Smith
MACDONALD SMITH
Iowa Bar #: AJ0007391
Smith & McElwain Law Office
505 Fifth Street, Suite 530
P.O. Box 1194
Sioux City, IA 51102
Phone: (712) 255-8094
Facsimile: (712) 255-3825
E-Mail: smitmcel@aol.com

BRIAN P. MCCAFFERTY
Pennsylvania Bar # 66257
Kenney Lennon & Egan Law Firm
3031C Walton Road, Suite 202
Plymouth Meeting, PA 19462
Phone: (610) 940-9099
Facsimile: (610) 940-0284
E-mail: cafstar@aol.com

MICHAEL HAMILTON
Tenneesee Bar # 10720
Provost Umphrey Law Firm, LLP
2002 Richard Jones Road, Suite C-103
Nashville, TN 37215
Phone: (615) 242-0199
Facsimile: (615) 256-5922
E-mail: mhamilton@provostumphrey.com

JAIRUS M. GILDEN
Illinois Bar # 12972
2711 Eastwood Avenue
Evanston, IL 60201
Phone: (847) 328-8542
Facsimile: (847) 328-8542

ROBERT D. METCALF
CONNIE HOWARD
Metcalf, Kaspari, Howard
Engdahl & Lazarus, P.A.
333 Parkdale Plaza
1660 South Highway 100
Minneapolis, MN 55416-1573

Attorneys for Plaintiffs

DATED: February 5, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Docket No. C:07-cv-4009-MWB

DALE SHARP, et al. on behalf of themselves and all other similarly situated individuals,

Plaintiffs,

v.

TYSON FOODS, INC.

Defendant.

CLASS ACTION

PLAINTIFFS' MOTION FOR RULE 23 CLASS CERTIFICATION

* * * *

EXHIBIT A

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

CASE NO. C:07-CV-4009-MWB

DALE SHARP, et al. on behalf of themselves and all other similarly situated individuals,

Plaintiffs,

v.

TYSON FOODS, INC.

Defendant.

TAKEN ON BEHALF OF PLAINTIFFS

DEPOSITION OF WILLIAM E. SAGER II, taken at 1:15 p.m. on January 4, 2008, before Matisha M. Stratton, RMR, CCR, and General Notary Public in and for the State of Nebraska, at the law office of Baird Holm, LLP, located at 1700 Farnam Street, 1500 Woodmen Tower, Omaha, Nebraska.

* * * *

[31] A. Okay. If the scheduled start time in this case for A cut is 6 o'clock, then that is when the first hog hits the floor, and that is when work actually commences; therefore, that is when work time starts.

Q. When you say "work time," do you mean paid time?

A. Paid time, yes. And then it stops as soon as the last hog hits the floor.

Q. Have you ever heard the term "gang time" before?

A. Yes.

Q. Is the system you're describing with work commencing when the first hog hits the floor and ending when the last hog hits the floor? Is that—

A. That's gang time.

Q. Gang time?

A. Yes.

* * * *

[47] Q. Do you now what a K code is?

A. Yes.

Q. Is the K—Well, tell me what a K code is.

A. K code is essentially a code that is—that assigns a certain number of minutes to a position based on the equipment required to be worn for that position.

Q. And this K code covers pre- and post-shift activities?

A. Yes.

Q. Is the K code meant to address any time that an employee might lose during an unpaid break removing equipment or walking either to a cafeteria or rest room?

A. Yes.

Q. You think it does?

A. Well, the way I understand a K code—Well, rephrase your question. That would be better.

[48] Q. Well, I think you started to answer it. I mean, the way the K code's been described to me and I believe the way it may even be designated on a pay stub is that it covers pre- and post-shift activities. Have you heard that?

A. Yes.

Q. Or do you have the same understanding I have?

A. Yes.

Q. To me, pre- and post-shift activities mean pre-gang time and post-gang time; would you agree with me on that?

A. Yes.

Q. So my question is: Is it your understanding that the K code time that employees are paid is meant to address any time that an employee might lose or claim they're losing doing any donning activities—or doffing—donning or doffing activities or walking minutes during the 30-minute unpaid break?

MS. BALUS: I'm just going to object. It's outside of the scope of his topics. We've already had a witness talk about it. To the extent you know, you can testify about it.

A. It's my understanding, rightly or [49] wrongly, that the K code is basically set up to cover the time that it takes to don and doff prior to or after the shift, not and including the 30-minute unpaid break, I suppose would be included in that as well.

* * * *

[67] Q. All right. Has there been a change [68] in how Tyson treats the K code in the last two years?

A. Yes.

Q. And when did that change occur at Storm Lake?

A. It was in 2007. I can't recall exactly when that was. I want to say the first half of the year, but I don't recall exactly.

Q. And can you explain to me what the change in the K code was at that time?

A. Sure. Initially, the K code was four minutes additional based on department. So in other words, if you, were in this particular department, regardless of what type of equipment you had, if any, you were paid four minutes. The change that occurred is now it can range anywhere from—if the K code is paid, and it's not in all instances, based—It's based on position. I may be in a position where I don't get a K code based on the fact that I just—I don't have any equipment. Otherwise, it can range anywhere from four to seven minutes. But again, it's not—it's no longer based on department, it's based on position.

Q. So it's your understanding that the [69] maximum that any employee at Storm Lake gets in terms of K code is seven minutes?

A. I believe so.

Q. And when you say "seven minutes," that's a total of seven minutes and not seven minutes in addition to the old four minutes?

A. Correct.

Q. And I believe the way you described it is would it be fair to say that some employees that used to get four minutes under the old K code system, K code, if I didn't say that right, are now not—some of them are not getting anything now?

A. Correct.

* * * *

EXHIBIT "B"

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

Case No. C:07-CV-4009-MWB

DALE T. SHARP, et al. on behalf of themselves and all other similarly situated individuals,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

TAKEN ON BEHALF OF PLAINTIFFS

DEPOSITION OF ELIZABETH J. STOUGH, taken at 11:26 a.m. on January 4, 2008, before Matisha M. Stratton, RMR, CCR, and General Notary Public in and for the State of Nebraska, at the law office of Baird Holm, LLP, located at 1700 Farnam Street, 1500 Woodmen Tower, Omaha Nebraska.

* * * *

[3] Q. Can you state your name for the record.

A. Elizabeth Joann Stough.

Q. And by whom are you employed?

A. Tyson.

Q. Do you work at a particular location?

A. The Tyson plant in Storm Lake, Iowa.

MS. BALUS: And I'll just state on the record that we're designating this confidential, subject to the protective order.

Q. What is your job title there?

A. Plant controller.

Q. And can you tell me generally what your job duties are?

A. I manage the accounting department at the plant.

* * * *

[13] Q. Does the kill floor get paid on a gang time system?

A. Yes.

Q. Does the cut floor get paid on a gang time system?

A. Yes.

Q. Does retrim get paid on a gang time system?

A. Yes.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Docket No. 5:07-cv-4009 MWB

DALE T. SHARP, et al., individually, and
on behalf of a class of others similarly situated,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

DECLARATION OF BILL HAUKAP

I, Bill Haukap, having personal knowledge of the facts contained in this declaration and being competent to testify to them, hereby state as follows:

1. I am employed as the Processing Supervisor in the Cut department on the A shift at the Storm Lake, Iowa facility of Tyson Foods, Inc. In addition to the main Cut line, I also supervise the Giblet line, Jowl line, Bone Cannon room, and Utility room, as well as the Hog Pushers and Mule Drivers that work in the Cut department. The main Cut line cuts the carcasses into halves and further trims the carcass. The Giblet line trims the giblets to specification and drops them on a belt to be sent to the Utility room. The Jowl line removes the jowl from the carcass and trims the jowl of skin and hair. The Bone Cannon room sorts out the neck bones with spinal cords in them and boxes the trimmings that come out of the Baader machine. The

Utility room halves the spare ribs and separates the bones from the spare ribs. 1 have held this position since 1995. Before that, I worked as a Cut Supervisor at Tyson's Louisa County, Iowa facility from 1985 through 1995. I began working for Tyson as a Supervisor Trainee in 1985 at the Storm Lake facility.

2. In my position as a Cut Supervisor with Tyson, I am familiar with the policies and procedures, required and optional clothing and equipment, work schedules and methods of recording time for purposes of compensation for all of the hourly team members that I supervise.

3. There are five team members on the Giblet line: four Giblet Trimmers and one Skirt Meat Trimmer. The Giblet Trimmers use a straight knife and the Skirt Meat Trimmer uses a whizzard knife. The Jowl line, which removes the jowl off the carcass, includes two Jowl Droppers, one Jowl Flipper, one Fanner, and three Jowl Trimmers. The Jowl Dropper and Trimmers use straight knives. Three team members work in the Bone Cannon room: one Sorter that checks for spinal cords, one Boxer that boxes and stacks the finished product, and one Box Maker. No team member in the Bone Cannon room uses a knife. Eleven team members work in the Utility room: one Band Saw Operator, eight Bone-In Short Rib Trimmers, one Inspector, and one Box Maker. Only the Bone-In Short Rib Trimmers use knives. The Cut department also employs three Hog Pushers that move the carcasses from the cooler onto the line, seven Mule Drivers that operate forklifts for the various lines in the Cut department, and two Case Seal Operators that glue shut the boxes from the Cut department, These team members also do not use knives.

4. The clothing and equipment that team members wear differs from department to department and position to position. All team members listed above are required to wear a hard hat, hairnet, beardnet (if necessary), hearing protection, and a frock. Straight knife users must wear a scabbard and steel and whizzard knife users must wear a steel. Since 2007, all team members are required to use a no-maintenance steel that does not need to be sanded. The Giblet Trimmers and Skirt Meat Trimmer must also wear a belly guard, mesh glove and plastic arm guard on their non-knife arm, and polar sleeves on both arms. Trainees in these positions must wear "no cut" Kevlar gloves, but they are optional after the training period has ended. The belly guard, arm guard, Kevlar gloves and mesh gloves are required in order to protect team members from accidentally hurting themselves with the knives that they use. Rubber gloves, cotton gloves, and plastic aprons are optional on the Giblet line. Jowl Droppers must wear a belly guard, plastic apron, a mesh glove on their non-knife hand, a "header" arm guard (which curves above the elbow), and polar sleeves on both arms. Jowl Trimmers must wear a belly guard, a mesh glove or Kevlar glove on their non-knife hand, a plastic arm guard on their non-knife arm, and polar sleeves on both arms. The Fanner must wear a plastic apron and rubber gloves because he uses 180 degree water. Because the Jowl Flipper does not work with a knife, he does not require any additional items. Rubber gloves are not required when touching the product. In the Bone Cannon room, the Sorter must wear rubber gloves. The Boxers in both the Bone Cannon and Utility rooms must wear safety glasses, a plastic apron, and rubber gloves when handling dry ice. The Box Maker must also wear safety glasses, a plastic apron, and rubber gloves when handling dry ice. In the Utility

room, the Band Saw Operator must wear safety glasses. The Bone-In Short Rib Trimmers must wear a belly guard, mesh glove, polar sleeves, and a plastic arm guard. When training, these Trimmers must also wear a Kevlar glove on their non-knife hand. Hog Pushers and Indexers may choose to wear a rain suit and rubber gloves, but these items are optional. Mule Drivers are required to wear an orange safety vest and must don safety glasses when using dry ice. Case Sealers are only required to wear safety glasses and weight belts.

5. All of the clothing that my team members wear is easy to put on and take off and lightweight. I routinely see team members putting on and taking off their clothing while walking to and from the locker area and while talking and focusing on other matters. I estimate that all of the team members I supervise can put on their required items in less than one minute. It takes new employees a little longer until they gain experience at putting their equipment on. At the end of the shift, it takes team members about two to three minutes to remove and wash their items, hang them in their locker, and wipe down the steel if they use one.

6. Team members keep their clothing and equipment, including their knives if they use them, in their locker in the locker rooms. At the end of a shift, team members place their frocks, gloves, polar sleeves, and aprons in a laundry bag that is dropped in a bin in the locker room then laundered by the facility and replaced in each team member's locker before the start of the next shift. Team members also keep their safety glasses, hearing protection, hairnet, beardnet (if needed), and hard hat in their lockers in the main locker room.

7. Before shift, team members retrieve their clothing and equipment from their lockers in the locker room. Team members that use knives must dip their knives, scabbard, steels, arm guards, belly guard, and mesh gloves in a sanitizing solution located in the entrance to the department before reporting to their work station, It takes team members less than 10 seconds to dip all of these items. Other than their frock, hard hat, hairnet/beardnet, and hearing protection, team members do not have to put on their required clothing before entering the production floor. Some team members put on all their clothing before entering the production area, while others put some items on after arriving on the production floor. Many team members put on some items while walking such as their safety glasses and polar sleeves. Team members do not have to wash their hands, clothing, or equipment before starting production work.

8. At the end of shift, knife users take of and rinse their knives, scabbard, steels, arm guards, belly guard, and mesh gloves at one of spray hoses off the production area. This takes approximately two minutes for most team members. Knife users do not have to sanitize their equipment after shift. Team members who do not use knives do not have to perform any washing after shift.

9. Most team members on the Cut floor clock in and out at either the time clock in the cafeteria or at the time clock in the hallway by the second entrance to the Cut floor which is across from the Rendering Department. In my department, most team members are required to work and are paid for the length of production, or gang time. Gang time starts at 6:00 a.m., when the first hog carcass hits the Main Break line. The end of gang time differs daily and is recorded as the time at which the last hog carcass hits the Main Break line.

Each day, I write on that day's time and attendance record the time at which the last carcass hits the line and team members are paid until that time. The Jowl Dropper, Jowl Trimmers, and all Giblet Trimmers must arrive to their work station two minutes before the start of gang time, but they also leave the line two minutes before the end of gang time.

10. Some team members in my department either start work earlier than gang time or stay later than the end of gang time. For example, the paid start times for one Hog Pusher, one Case Seal Operator, and one Utility room team member begins 15 minutes before the start of gang time. They must be in the department at that time. On such occasions, team members are able to put on any required items while on paid time. One or both of the Case Seal Operators will also stay beyond the end of gang time and are paid until they clock out after leaving the department. Accordingly, these team members can remove some of their clothing on paid time. The Bone Cannon Operator's paid start time begins 30 minutes before the start of gang time. All Mule Drivers' paid start time begins 15 minutes before gang time and they are paid 15 minutes beyond the end of gang time. If Mule Drivers finish their post-shift duties in less than 15 minutes they are permitted to doff on paid time.

11. I review team members' time and attendance reports daily. I approve paying those team members performing clean up until they clock out (unless their clock out time far exceeds the end of their clean up duties). These team members remove most of their equipment while on paid time before they perform their clean up duties.

12. Team members in my departments each receive a 15-minute paid break and a 30-minute unpaid meal period each shift. Team members do not have to remove their hard hat, hairnet/beardnet, hearing protection, polar sleeves, or safety glasses to go the cafeteria. They may keep their remaining clothing items and equipment on hooks at their work station or near the wash room. Team members also are not required to wash or sanitize anything either before or after the meal period. Team members may use the restroom as needed with supervisor permission while the line is running. Team members must wash their hands after using the restroom.

13. No team members have indicated to me that they think they are being paid for the actual time they spend changing into and out of their clothes and washing their equipment, and no team members have complained about not being paid for the actual time spent on these activities. I have never told team members that they are or should be paid for the actual time they spend on these activities. I am not aware of any documents provided by the company to team members describing how they are paid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: 7-28-08

/s/ Bill Haukap
BILL HAUKAP

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

Docket No. 5:07-CV-4009 MWB

DALE T. SHARP, et al.,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

DECLARATION OF RON PETERS

I, Ron Peters, having personal knowledge of the facts contained in this declaration and being competent to testify to them, hereby state as follows:

1. I am employed as a Supervisor in the Shave room on the Kill floor on the first ("A") shift at the Storm Lake, Iowa facility of Tyson Foods, Inc. I have held this position for approximately one year. I have been a Supervisor for 12 years and have been employed at the Storm Lake facility since November 1, 1982, always on the Kill floor.

2. The Shave room consists of the stick pen and the trolley room. First, the hog is stunned with an electric circuit by the Stunner. The Shackler then shackles the hog around the foot. There are two Stickers each taking alternate hogs to stick them for the purpose of draining all of the blood out of the animal. The hog then goes through the scald tub, which is controlled by

one Tub Tender, to soften the skin to allow the hair to come off more easily. The hog then goes through a dehairer, which tumbles the animal to force the hair to fall off. The dehairer is run by the same team member who runs the scald tub. The hog then comes to the Gam table. Two Hog Rollers position the hogs so the two Cord Cutters and two Hog Hangers can rehang them by the leg. Once the hogs are rehung, the Indexer pushes them onto the line, where they are sent through a singer, the polisher, and are then shaved by one Side Shaver. Then they go through the predrier, another singer, another polisher, and then pass by three Ham Shavers and another Side Shaver. The hog then passes four Shoulder and Jowl Shavers, one of whom runs a hand skinner. Then the Flusher flushes the hog's mouth out with water and the hog passes through a washer that washes off all of the remaining hair. The Toe Notcher notches the toes, two Bung Gun persons cut around the bung, and one Remove Eyelid team member cuts off the eyelids. All of the positions in this process are paid based on gang time.

3. There are two other team members who are considered part of the Shave Room but are not tied to the chain: one Janitor and one Trolley Room person, who re-oils the trolleys and brings them back to the line.

4. In my position as a Kill floor Supervisor with Tyson, I am familiar with the policies and procedures, required and optional clothing, work schedules, and methods of recording time for purposes of compensation of all the hourly team members on the Kill floor at the Storm Lake facility.

5. Many of the positions on the Kill floor are paid based on gang time; however, some are not. For example, the Janitor and the Trolley Room person are not paid based on gang time. The Janitor starts at the same time as the Gutters which is the start of gang time, and stays after the end of gang time to do a wash down between the two shifts, for which he is paid an additional 30 minutes, plus a second 15-minute break. The Janitor can remove his required equipment during this paid time. The Trolley Room team member starts working with the Cut floor at the start of his shift, but ends his shift with the Kill floor, so he gets an additional hour and a half pay beyond gang time, plus a second 15-minute break. The Trolley Room team member can remove his required equipment during this extra paid time. Additionally, on Monday mornings the Trolley Room person starts working before the start of gang time to fill the caustic tank and the oil tank, for which he gets an additional 2 hours and 45 minutes pay, plus a second 15-minute break. The Trolley Room team member can put on his required equipment during this extra paid time. Gang time for the Kill floor, until February 4, 2007, was typically seven hours and 56 minutes. Since February 4, 2007, gang time has typically been seven hours and 55 minutes.

6. One team member who works on the Gam table is paid an additional 45 minutes, plus an additional 15-minute paid break, to stay after the end of shift and help clean up the floor. The Gam can remove his required equipment during this additional paid time. There is also one team member who comes in before the shift to set up in the Trolley Room for which he gets an additional 1 hour and 45 minutes pay, plus a second 15-minute break. The Trolley Room team member can put on his required equipment during this extra paid time.

7. The clothing that team members wear differs from position to position. For example, the Stickers are required to wear one mesh glove, a face shield, a mesh apron, plastic gloves, and an arm guard. They may also choose to wear a rain jacket and plastic sleeves. The Shavers are all required to wear a Kevlar glove, a rubber glove, and an arm-guard on their non-knife hand. They may wear anything they choose on their knife-hand, including going barehanded. They are also required to wear a plastic apron. The Hand Skinner Operator is required to wear a mesh glove on the non-knife hand, a Kevlar glove on the knife hand, rubber gloves, and one mesh sleeve. A plastic apron is optional. The Cord cutters are required to wear a mesh glove and a plastic glove on their non-knife hand and an arm guard. What they wear on their knife-hand is optional, as is a plastic apron. The Stunners are not required to wear anything, but they usually choose to wear cotton gloves. The Shacklers are required to wear a face mask and may choose to wear gloves. The Bung Gun team member is required to wear a mesh glove, plastic gloves, and a plastic apron. The team member in this position sometimes chooses to wear an arm guard. The Indexer is required to wear safety glasses; gloves are optional. The Trolley Room team member is required only to wear safety glasses. The Tub Tender is required to wear plastic gloves, cotton gloves, and a safety harness belt. The Toe Notcher is required to wear safety glasses; gloves and a plastic apron are optional. The Flusher is required to wear a plastic apron and plastic gloves. The Eyelid Trimmer is required to wear mesh gloves, plastic gloves, and safety glasses. The Hog Rollers are required to wear Kevlar gloves on both hands. Everyone on the Kill floor is required to wear the white shirt and pants (or the blue uniform, in the case of the Janitor).

8. The equipment that team members wear varies in weight, is not overly cumbersome, and takes minimal time and little or no concentration to put on or take off. I have routinely seen team members putting on and taking off their equipment while walking to and from the locker area, while talking and focusing on other matters. Some team members are able to put on their required equipment in a minute while some members take a little longer. In my experience, team members get quicker as they gain practice.

9. Team members keep their clothing in their lockers between shifts. They place all of their dirty clothing (sometimes including their mesh gloves) into a laundry bag, which they throw into hampers or drop at the laundry near the locker rooms. The laundry bag has an identification tag on it with the locker number. The dirty laundry is washed, dried, and returned to the locker area where it is hung inside each team member's locker. When the team member arrives at the beginning of the shift, his clean clothing is usually hanging inside his locker. They should not have to pick up any items anywhere other than their locker at the start of the shift.

10. Under Tyson's policy, it is my responsibility to assure that team members in my area are paid for all time worked. I am provided with a daily Time & Attendance (T&A) summary for all the team members I supervise. If for any reason team members work beyond their scheduled hours, I will make daily adjustments to their time and attendance as necessary.

11. All team members on the Kill floor receive a 15-minute paid break and a 30-minute unpaid meal period during each shift. Typically, the meal period begins five hours after the start of shift. For example, the Stickers start at 6:58 a.m., so their meal period

should begin at 11:58 a.m. However, before the team members in the stick pen can go to the meal period, both shoots have to be empty and there can be no hogs in the restrainer. Therefore, sometimes the meal period starts a little later if the hogs are not cooperating. Everyone always gets the full 30 minutes from the time they leave the line until the time they need to return to the line.

12. The Janitors take their meal period at a later time than the other Kill floor team members, but they always get a full 30-minute meal period. The Janitors usually remove their required equipment during paid time before the start of their meal period.

13. Team members are not required to wash any of their equipment at the meal period.

14. Team members are no longer required to sand their steels. The process changed sometime at the beginning of the summer in 2007. When team members were required to sand their steels, the frequency with which they performed the activity varied from team member to team member. Sanding a steel should only take a couple of minutes.

15, Tyson provides each team member who uses a knife with two knives, which are already sharpened. Just before the end of the shift, a team member [sic] one knife in a tub in the department to be sharpened by the knife room and keeps one knife in his scabbard in his locker. The newly sharpened knives are then passed out to each team member after the shift has started the next day. Team members are not allowed to go to the knife room before or after a shift or during their meal period.

16. Team members should steel one knife before their first piece of meat arrives at the start of the shift. Each team member differs on bow they steel their knife and how many times they must pass the knife over the steel. When I was an hourly team member, I only needed two swipes on each side of the knife, which took no more than a couple seconds.

17. At the end of the shift, team members must wash their hard hats, scabbards and boots with the wash hoses located on the floor. Some team members spray their mesh, but the mesh should not be too dirty because the mesh glove is covered with a plastic glove and the mesh apron is generally covered with a plastic apron. Some team members also put their mesh items in their laundry bag to be washed. They also put their plastic gloves, Kevlar gloves, and plastic aprons in their laundry bags. Most team members in the Shave room do not get particularly dirty, The Stickers may get bloody, but they can take breaks periodically throughout the shift so they have time to clean off on paid time. Also, the Ham Shavers and Side Shavers sometimes cover for one another so the other can start to clean up on paid time before the shift has ended.

18. It takes 3 to 4 minutes on average for team members in my department to perform their pre- and post-shift clothes changing and washing activities.

19. On or around February 4, 2007, the Storm Lake plant changed the way the team members on the Kill floor were paid for pre- and post-shift activities. Before February 4, 2007, any team member who received additional pay for such activities were given four additional minutes, which time was delineated in the time and attendance system with a K code. Who received the K code depended upon the department in which the team member worked. Since February 4, 2007,

however, team members receive varying amounts of minutes for pre- and post-shift activities, depending upon the job they worked. These additional minutes are also delineated in the time and attendance system under the K code.

20. I have never spoken to any team members about how they would be paid for activities performed before or after shift or during the meal period. I have never provided any team member with any documents related to how they are paid. If a team member complains to me that he has not been paid correctly – for example, if he believes he did not get paid for extra hours or a double shift he worked – I check with payroll to determine whether that team member was paid correctly, and if not, I give them a retro or a manual to make sure they receive the pay they are owed.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2-28-2008

/s/ Ron Peters
RON PETERS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

Docket No. 5:07-CV-4009 MWB

DALE T. SHARP, et al.,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

DECLARATION OF CURT ANDERSEN

I, Curt Andersen, having personal knowledge of the facts contained in this declaration and being competent to testify to them, hereby state as follows:

1. I am employed as the Plant Superintendent for the Cut and Retrim floors (a.k.a. the Cold Side) on the first ("A") shift at the Storm Lake, Iowa facility of Tyson Foods, Inc. I have held this position for approximately nine months. Prior to becoming a Superintendent, I was a general Cut Supervisor for about 3 years. Prior to that, I was a general Load Out Supervisor for about three years. I have been employed at Tyson's Storm Lake facility since June 18, 2001.

2. On the Cut floor, the team members break the hogs down into the various primals (*e.g.*, bone-in ham, bone-in loin, spare rib, picnic, butt, and belly). The Cut floor is divided into the following departments: the Main Break line (department 721), the Butt line (department

722), the Belly line (department 723), the Picnic line (department 724), the Bone-In Loin and Bone-in Spare Rib lines (department 725), and department 726, which is a catchall department that includes the Hog Pushers in the cooler, Jowl line, Giblet line, and other various areas.

3. On the Retrim floor, the team members further process the hogs into smaller primals. The Retrim floor is divided into the Boneless Loin line (department 765) and the Boneless Ham line (department 760).

4. In my position as a Superintendent with Tyson, I am familiar with the policies and procedures, required and optional clothing, work schedules, and methods of recording time for purposes of compensation of all the hourly team members on the Cut and Retrim floors.

5. Many of the positions on the Cut floor are paid based on gang time; however, some are not. For example, the Mule Drivers are not paid based on gang time. They typically start their shift before gang time and end after and are paid for these additional minutes. Floor janitors are also detached from gang time and have staggered start and end times. Gang time for the Cut floor, until February 4, 2007, was typically seven hours and 56 minutes. Since February 4, 2007, gang time has typically been seven hours and 55 minutes.

6. The start and end times for each position are staggered based on when the meat reaches each work station. For example, the Main Break line receives the carcasses from the cooler before the Picnic line, so the team members on the Main Break line start and end production work earlier than those on the Picnic line. Additionally, team members at the beginning of a line usually start and end production work before those at the end of the line. For example, it takes approximately

four minutes for a carcass to run down the entire Picnic line. Therefore, a team member at the beginning of the Picnic line will start and end production work approximately four minutes before a team member at the end of the Picnic line. Each team member does not need to be at their work station until the first product passes their work station.

7. The Retrim floor runs on eight or nine hour shifts rather than seven hours and 56 minutes. When the department runs nine hours, all of the team members are paid an additional 15-minutes (*e.g.*, the line will run until 3:30 p.m., but the team members will be paid until 3:45 p.m.).

8. All of the team members on the Cut floor who use draw knives (*i.e.*, the loin pullers, loin trimmers, and rib pullers) get an additional 10 minutes of paid time every morning so that they may collect the draw knives from the knife room and stone and steel them before the shift starts. Some team members may not take the entire 10 minutes to prepare their knives in which case they can put on their required equipment during paid time. The clothing that team members wear differs from department to department and from position to position. Some team members choose to wear additional clothing that is not required of them, and some team members have a choice in the clothing items they wear. For example, the team members working in Boneless Ham can choose whether they want to wear a mesh glove or a Keviar glove. Cotton gloves are also optional for team members, with a limit of one per hand. However, if a team member chooses to wear a green rubber glove, they must wear a cotton glove over it to avoid cutting their rubber gloves so that pieces of rubber do not end up in the product. No

team member is required to wear green rubber gloves, but most choose to do so to keep their hands warm.

9. The clothing that team members wear varies in weight, is not overly cumbersome, and takes minimal time and little or no concentration to put on or take off. I have routinely seen team members putting on and taking off their clothing while walking to and from the locker area, while talking and focusing on other matters. Team members must be wearing their frocks prior to entering the production floor, but I have seen team members putting on their gloves or sleeves while walking to the production line. Some team members are able to put on their required clothing in a minute while some members take a little longer. In my experience, team members get quicker as they gain practice.

10 The team members gather their clothing and equipment from their lockers every day. Other than team members using draw knives, team members should not have to pick up any items anywhere other than their locker.

11. At the beginning of each shift, team members who use a knife, scabbard, hook, mesh gloves, arm guards, steels, or mouse traps, dip these items in a sanitizing liquid as they enter the production floor. On average, it takes seconds to complete this process. Team members do not have to dip any items at the end of the shift.

12. Unless they drop something on the floor, team members are only required to wash clothing at the end of each shift.

13. Team members keep their clothing in their lockers. They place all of their dirty clothing (sometimes including their mesh) into a laundry bag, which they throw into hampers or drop at the laundry near the

locker rooms. The laundry bag has an identification tag on it usually with the locker number. The dirty laundry is washed, dried, and returned to the locker area where it is hung on each team member's locker. When the team member arrives at the beginning of the shift, his clean clothing is usually hanging on his locker.

14. Under Tyson's policy, it is the supervisors' responsibility to assure that team members are paid for all time worked. Each line supervisor is provided with a daily Time & Attendance (T&A) summary for all team members they supervise. If for any reason team members work beyond their scheduled hours, their supervisor will make daily adjustments to their time and attendance as necessary.

15. There are several team members who perform set up activities before the start of shift. For example, some team members come in 15 to 20 minutes early to set up the bagging stations. Some team members come in about 25 minutes early to set up the multivac machine. Other team members come early to set up the knife sterilizers. All of these set up team members are paid additional minutes to perform these activities and they put on their required equipment upon completion of the set up work while still on paid time.

16. All team members on the Cut and Retrim floors receive a 15-minute paid break and a 30-minute unpaid meal period during each shift. On the Cut floor, the meal period occurs at the same time every day, approximately 11:30 a.m. On the Retrim floor, the ham line always takes its meal period at 12:15 p.m. The time at which the team members on the Loin line on the Retrim floor take their meal period varies according to the number of hours the line will be working. If the Retrim floor is scheduled to run for eight hours, the loin line will take the meal period at 11:45 a.m. If the

Retrim floor is scheduled to run for nine hours, the loin line will take the meal period at 12:00 p.m. Team members always receive a full 30 minutes from the time they leave the line until the time they need to return to the line.

17. Team members who plan on going to the cafeteria during the meal period usually remove their frock and their gloves. It takes most team members 5 seconds to remove these items. Their mesh aprons and sleeves do not have to be removed because they are worn under the frock and therefore are not exposed to the meat; however, some team members choose to remove these items during the meal period. Team members usually leave their gloves at their work station and hang the frock and mesh apron on hooks along the walls of the production floor.

18. Team members no longer are required to sand their steels. The process has changed in the last six months or so. When team members were required to sand their steels, the frequency with which they performed the activity varied from team member to team member. Some team members would sand their steels daily, whereas others would only do it once a week.

19. Tyson provides each team member who uses a knife with two knives, which are already sharpened. At the start of the shift, before the first piece of meat reaches their workstation, team members usually have at least one good knife ready to go that they steel by swiping it a few times on each side. In the afternoon, the trainer will come around with a bucket to trade out any knives that need to be sharpened.

20. On or around February 4, 2007, the Storm Lake plant changed the way the team members on the Cut and Retrim floors were paid for pre- and post-shift activities. Before February 4, 2007, any team member who received additional pay for such activities were given four additional minutes, which time was delineated in the time and attendance system with a K code. Who received the K code depended upon the department in which the team member worked. After February 4, 2007, however, team members received between four and seven minutes for pre- and post-shift activities, depending upon the job they worked. These additional minutes are also delineated in the time and attendance system under the K code.

21. The only time I have ever spoken with any team member about whether they were being paid for donning/doffing/washing time was around February 4, 2007, when the new K codes were implemented and only to explain how the number of minutes were assigned. All of the supervisors were told by plant management how to explain to the team members the changes that were taking place with respect to the K code. I have never provided any team member with any documents related to how they are paid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2-28-08 /s/ Curt Andersen
CURT ANDERSEN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION — SIOUX CITY

Docket No. 5:07-CV-4009 MWB

DALE T. SHARP, et al.,
Plaintiffs,

v.

TYSON FOODS, INC.,
Defendant.

DECLARATION OF RANDY STORY

I, Randy Story, having personal knowledge of the facts contained in this declaration and being competent to testify to them, hereby state as follows:

1. I am employed as a Supervisor on the Kill floor on the second ("B") shift at the Storm Lake, Iowa facility of Tyson Foods, Inc. I have held this position for approximately 14 years, Prior to this position, I worked as an hourly team member on the Kill floor from August 19, 1984 until I became a Supervisor in 1993.

2. In my position as a Kill floor Supervisor with Tyson, I am familiar with the policies and procedures, required and optional clothing, work schedules, and methods of recording time for purposes of compensation of all the hourly team members on the Kill floor at the Storm Lake facility.

3. Many of the positions on the Kill floor are paid for the length of production, or "gutter" or gang time. Gutter or gang time begins when the first carcass hits

the first position on the line and ends when the last carcass hits the first position on the line.

4. Some team members in my department either start work earlier than gang time or stay later than the end of gang time. For example, there are three to five team members who work pre-shift doing set up activities in the department. Some are paid to come in 30 minutes early and some come in 15 minutes early depending on what they do. There are a similar number who do clean up activities for 15 to 30 minutes after the end of gang time. One team member stays two to two and a half hours after shift to clean knives. All of these individuals are paid for the extra time they work. These Team members often remove their clothing and equipment during paid time.

5. The clothing that team members wear differs from position to position and department to department. The clothing requirements are as follows for those in my departments:

> Stun Hogs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.
>
> Shackle Hogs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, catcher's mask and rubber apron. Rubber and cotton gloves are optional.
>
> Stick Hogs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, extended face mask, steel mesh apron, arm guard, mesh glove on off hand, scabbard, steel, knife and rubber apron.

Tub Tender – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are required.

Rolling Hogs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, kevlar gloves, weight belt, and rubber apron. Rubber and cotton gloves are optional.

Cut Gams – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh glove, arm guard, scabbard, steel, knife and rubber apron. Rubber and cotton gloves are optional.

Hang Hogs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.

Index Hogs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.

Shave Sides – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, kevlar glove (off hand), arm guard, scabbard, knife, steel and rubber apron. Rubber and cotton gloves are optional.

Shave Hams – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, kevlar glove (offhand), arm guard, scabbard, knife, steel and rubber apron. Rubber and cotton gloves are optional.

Shave Shoulders/Jowls – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed

boots, kevlar glove (off hand), arm guard, scabbard, knife, steel and rubber apron. Rubber and cotton gloves are optional.

Flush Heads – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.

Notch toes – Hard hat, whites (pant and shirt) hairnet, hearing protection; steel toed boots, safety glasses and rubber apron. Rubber and cotton gloves are optional.

Drop Bungs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh glove (off hand), and rubber apron. Rubber and cotton gloves are optional.

Trim Eye Lids – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, steel and rubber apron. Rubber and cotton gloves are optional.

Break Necks with Cutter – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, safety glasses, rubber gloves and rubber apron. Cotton gloves are optional.

Drop Heads – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, kevlar glove (offhand), arm guard, scabbard, knife, steel and rubber apron. Rubber and cotton gloves are optional.

Head Inspect – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh glove (off hand), mesh sleeve, arm guard, scabbard, knife, steel and rubber apron. Rubber and cotton gloves are optional.

Recondition Heads – One wears hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional. The other wears a hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard, knife, steel and rubber apron. Rubber and cotton gloves are optional.

Brisket Saw – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, safety glasses, rubber gloves and rubber apron. Cotton gloves are optional.

Mark H Bones – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh apron, kevlar glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Clip H Bones – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh apron, kevlar glove (off hand), rubber gloves, aim guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Open Hogs – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh apron, kevlar glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Insert Hooks – Hard hat, whites (pant and shirt), hairnet, hearing protection, and steel toed boots. Rubber apron, rubber gloves and cotton gloves are optional.

Gut Hogs – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh

apron, kevlar glove (offhand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Inspect Viscera – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh apron, kevlar glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Separate Pluck – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Hang Hearts – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron, Cotton gloves are optional.

Recondition Viscera – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Save Spleen – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Save Uteri – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, and kevlar gloves (both). Rubber apron, rubber gloves and cotton gloves are optional.

Set Aside Guts – Hard hat, whites (pant and shirt), hairnet, hearing protection and steel toed boots. Rubber gloves, rubber apron and cotton gloves are optional.

Separate Stomachs – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, kevlar gloves (both) and rubber apron. Rubber and cotton gloves are optional.

Feed Stomachs – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.

Save Rectums – Hard hat, whites (pant and shirt), hairnet, hearing protection, and steel toed boots. Rubber gloves, rubber apron, rains suits, and cotton gloves are optional.

Pipe Rectums – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, face shield and rubber apron. Rubber and cotton gloves are optional.

Defat Rectums – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, kevlar glove (off hand), and rubber apron. Rubber and cotton gloves are optional.

Pack Rectums – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, rubber gloves and rubber apron. Cotton gloves are optional.

Pull Black Gut – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, nylon gloves (both), and rubber apron. Rubber gloves, rain suits and cotton gloves are optional.

Separate Black Gut – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, nylon gloves (both), and rubber apron. Rubber gloves, rain suits and cotton gloves are optional.

Large Intestine Pipers – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, face shield and rubber apron. Rubber and cotton gloves are optional.

Inspect Re Wash Chits – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, Kevlar gloves (both) and rubber apron. Rubber and cotton gloves are optional.

Pack Chits – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.

Pack Stomach – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, Kevlar gloves (both), safety glasses, rubber gloves and rubber apron. Cotton gloves are optional.

Pull Casings – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses or eye shield, mesh glove (off hand), arm guard, belly guard, rubber gloves and rubber apron. Cotton gloves are optional.

Machine Operator – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.

Carcass Trimmer – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard,

steel, and knife. Rubber apron, rubber gloves and cotton gloves are optional.

Split Saw – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses and rubber apron. Rubber and cotton gloves are optional.

Neck Trimmer – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (offhand), arm guard, rubber gloves and rubber apron. Cotton gloves are optional.

Cord and Castration Mark – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (offhand), arm guard, scabbard, steel, hook, knife, rubber gloves and rubber apron. Cotton gloves are optional.

Expose Kidneys and Remove Hooks – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard, steel, hook, knife, rubber gloves and rubber apron. Cotton gloves are optional.

Final Rail Trimmers – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), mesh sleeve, arm guard, scabbard, steel, knife, and rubber gloves. Rubber apron and cotton gloves are optional.

Retain Butcher – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh apron, mesh glove (off hand), arm guard, scabbard, steel, knife, rubber gloves and rubber apron. Cotton gloves are optional.

Remove Kidneys – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh apron, mesh glove (off hand), arm guard, scabbard, steel, knife, and rubber gloves. Rubber apron and cotton gloves are optional.

Pop Tongues – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard, steel, knife, belly guard or mesh apron, rubber gloves and rubber apron. Cotton gloves are optional.

Spike Heads – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots and rubber apron. Rubber and cotton gloves are optional.

Round Heads – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard, steel, and knife. Rubber gloves, rubber apron and cotton gloves are optional.

Mark Snouts – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard, steel, and knife. Rubber gloves, rubber apron and cotton gloves are optional.

Chiseler – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, belly guard, scabbard, and chisel. Rubber gloves, rubber apron and cotton gloves are optional.

Feed Snout/Jaw Puller – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots and rubber apron. Rubber and cotton gloves are optional.

Trim Ears – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, belly guard, mesh glove (off hand), arm guard, scabbard, steel, knife, and rubber gloves. Rubber apron and cotton gloves are optional.

Pate Trimmers – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Jaw Bone Trimmers – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Cheek Heads – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Back Head – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Trim Snouts – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Tongue Trimmer – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard,

steel, knife, belly guard and rubber gloves. Rubber apron and cotton gloves are optional.

VM Chill Room – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, Kevlar gloves (both), and rubber gloves. Rubber apron and cotton gloves are optional.

Box Maker – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses and rubber gloves. Rubber apron and cotton gloves are optional.

Box Offal Product – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, and rubber gloves. Rubber apron and cotton gloves are optional.

Lard Starter – Hard hat, whites (pant and shirt), hairnet, hearing protection, and steel toed boots. Rubber apron, rubber gloves and cotton gloves are optional.

Lard Puller – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, and nylon gloves. Rubber apron, rubber gloves and cotton gloves are optional.

Lard Scraper – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Spinal Cord Remover – Hard hat, whites (pant and shirt), hairnet, hearing protection, and steel toed boots. Rubber apron, rubber gloves and cotton gloves are optional

Pull Heart Fat – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed

boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Monitor the Hot Scale – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh apron, mesh glove (off hand), arm guard, scabbard, steel, knife, rubber apron and rubber gloves. Cotton gloves are optional.

Mark Tenders – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard, steel, knife, rubber gloves. Rubber apron and cotton gloves are optional.

Index Hogs – Hard hat, whites (pant and shirt), hairnet, hearing protection, and steel toed boots. Rubber apron, rubber gloves and cotton gloves are optional.

Hog Pushers – Hard hat, whites (pant and shirt), hairnet, hearing protection, rain suit and steel toed boots. Rubber and cotton gloves are optional.

Cooler Janitor – Hard hat, whites (pant and shirt), hairnet, hearing protection, Kevlar gloves, rubber gloves and steel toed boots. Rubber apron, rain suit and cotton gloves are optional.

6. The clothing that team members is not overly cumbersome and takes minimal time and little or no concentration to put on or take off. In my experience, team members get quicker as they gain practice. I have routinely seen team members putting on and taking off their clothing while walking to and from the locker area, while talking and focusing on other matters.

7. Team members keep their clothing in their lockers between shifts. At the end of the shift, team members place their whites, aprons, and gloves into a laundry bag, which they throw into hampers in the locker room or drop at the laundry near the locker rooms. The laundry bag has an identification tag on it with the locker number. The facility washes and dries these items and then returns them to each team member's locker. When the team member arrives at the beginning of the shift, his clean clothing is hanging inside his locker. Any items not laundered by the facility are kept in each team member's locker between shifts. Team members do not have to pick up any items other than at their locker at the start of the shift.

8. Under Tyson's policy, it is my responsibility to assure that team members in my area are paid for all time worked. I am provided with a daily Time & Attendance (T&A) summary for all the team members I supervise. If for any reason team members work beyond their scheduled hours, I will make daily adjustments to their time and attendance as necessary.

9. At the beginning of the shift, anyone who uses a knife, scabbard, steel, mesh glove, and arm guard must dip those items in a sanitizer on the way onto the Kill floor. This takes only seconds. In fact, most usually don't even stop as they walk by and dip their items.

10. All team members on the Kill floor receive a 15-minute paid break and a 30-minute unpaid meal period during each shift. Each person may leave the line for their break and meal period as soon as the last carcass goes past their work station. Everyone always gets the full 30 minutes from the time they leave the line until the time they need to return to the line

11. On a few occasions, I have asked certain team members to work during the regularly scheduled meal period. In those cases, the team members receive their full 30-minute meal period after the others have returned to the line. On some occasions, when the line breaks down, team members may get more than the 30 minutes for the meal period and can take off and put on their clothing on paid time.

12. Team members are no longer required to sand their steels. The process changed sometime at the beginning of the summer in 2007. When team members were required to sand their steels, most did so every day. Team members were permitted to sand their steels at home, in the locker room, or in the cafeteria.

13. Team members are only allowed to steel their knives at their work stations. Team members usually steel their knives before the first piece of meat arrives at the start of the shift during paid time. Steeling a knife takes about two swipes on each side of the knife which takes a couple of seconds.

14. At the end of the shift, team members are required to rinse their knife, scabbard, steel, mesh glove, arm guard, rubber apron, mesh apron, mesh sleeve, boots, hard hat and rubber gloves. It usually takes about 3 minutes to wash their equipment. After washing, team members must dip their knife, scabbard, steel, mesh glove, mesh apron, mesh sleeve and arm guard. Dipping these items takes about a second.

15. I have never spoken to any team member about how they would be paid for activities performed before or after shift or during the meal period. I have never

provided any team member with any documents related to how they are paid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2/27/08

/s/ Randy Story
RANDY STORY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

Docket No. 5:07-CV-4009 MWB

DALE T. SHARP, et al.,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

DECLARATION OF LIVORIO CARRILLO

I, Livorio Carrillo, having personal knowledge of the facts contained in this declaration and being competent to testify to them, hereby state as follows:

1. I am employed as an hourly team member on Line 721, the Loin line, on the first ("A") shift at the Storm Lake, Iowa facility of Tyson Foods, Inc. I work Pulling Loins, a job I have worked for 14 years. However, I often work in other positions to cover for other team members as needed. When I first started at the Storm Lake, Iowa facility, in July 1993, I worked pushing hogs and then trimming loins before moving to my current position.

2. In my position Pulling Loins, I am required to wear a hard hat, a hairnet, ear protection, a beardnet, a smock, a plastic apron, a belly guard, rubber boots, polar gloves (on both hands), rubber gloves (on both

hands), a polar sleeve, a white handled steel, a sharpening stone and a file for the steel. I also wear an optional back brace. It is not difficult to put on or remove my items of clothing.

3. I am paid to come in 10 minutes before the line starts running every day to sharpen my pull, or "draw," knives. During these ten minutes, I go to the knife room to pick up two knives and work the knives with a steel.

4. I receive a 30-minute unpaid meal period each shift. The exact time of our meal period varies depending on when the last piece of meat passes my work station, but it usually begins between 11:30 a.m. and 12:00 p.m. I do not have to wash or dip any equipment or clothing before my meal period. I simply remove both sets of gloves, the apron, belly guard, and frock and I leave them on the hooks by my work station which takes less than a minute. I do not have to be back at my work station until the first piece passes my work station which is always at least 30 minutes after the start of my meal period.

5. Production on my line typically ends around 2:30 p.m. but I am paid to work an extra 30 minutes to do cleanup activities in the department. At the end of my shift, I wash my steel, belly guard, apron, and boots. I also dip my steel, belly guard, and knifes. I then throw all items of clothing into the laundry bag and put the bag in a hamper right in the locker room. Since I work 30 minutes extra, I remove my clothes, wash, and dip on paid time.

6. I was never told by anyone that I would be paid for the actual time I spend changing into and out of my clothes and walking to my work station. I have never had a conversation with anyone from Tyson management about such time. I have never seen any documents indicating that I would be paid more than I already am for such time.

7. I have only had a problem with my pay on a couple of occasions, when a supervisor changed jobs for example, that there has been confusion over whether I should get my 10 minutes. I usually explain it to them and then it gets fixed. Other than that, I have never had any problems. Tyson always pays me for my extra clean up time.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: 2-28-08 /s/ Livorio Carrillo
LIVORIO CARRILLO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

[Filed: 10/07/10]

No. 5:07-cv-04009 JAJ

PEG BOUAPHAKEO et al., individually and
on Behalf Of Themselves and
All Other Similarly Situated Individuals,
Plaintiffs,

v.

TYSON FOODS, INC.
Defendant.

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Defendant Tyson Foods, Inc. submits the following proposed jury instructions.

* * * *

FINAL INSTRUCTION NO. 10

Burden for Collective Action; Class Action;
Representative Evidence (Defendant)

Plaintiffs have brought their federal claim as a collective action. That means that the Court has allowed other employees at Tyson Foods' hog-processing plant in Storm Lake, Iowa to pursue their claims collectively with the six named plaintiffs. These other employees are entitled to prevail on their Fair Labor Standards Act claims only if they establish that they are all similarly situated to the named plaintiffs and each other.

To show that all of the employees that plaintiffs seek to represent in this lawsuit are similarly situated, plaintiffs must establish that all of the employees joined in this suit were affected by a common, unlawful decision, policy, or plan. It is not enough that only some of the employees joined in this suit were affected by the decision, policy, or plan.

Both parties have presented various types of evidence: live or deposition testimony of hourly employees, supervisors, expert witnesses, and others; video clips; and documents. Not all affected employees need testify for plaintiffs to prove that they were similarly affected by a common decision, policy, or plan that violated the Fair Labor Standards Act. Rather, if some employees testify about the activities they allegedly performed or the amount of unpaid overtime they allegedly worked, other non-testifying employees who performed substantially similar activities are deemed to have shown the same thing by inference. This is called "representative testimony."

There is no bright-line as to the percentage of employees that must testify for their testimony to be representative. Rather, the weight to be accorded the evidence is a function not of its quantity, but of its quality. In evaluating the testimony, you may consider whether the witnesses who testified worked in similar positions and similar departments as the non-testifying employees; whether they wore similar sanitary and protective items; whether the testifying employees performed donning and doffing activities similarly to non-testifying employees; whether the witnesses who testified had the opportunity or ability to observe non-testifying employees; and whether there was evidence presented that either was consistent with or was inconsistent with the testimony of the testifying witnesses.

Although the elements of plaintiffs' Iowa claims are the same as those under the federal law, the standard that plaintiffs must meet to bring their Iowa claims on behalf of other current and former hourly employees at the Storm Lake facility is higher. To prove their Iowa claims, the six named plaintiffs must demonstrate the elements of their claims for each member of the class. That is, the plaintiffs must present common evidence that supports class-wide liability and does not vary from individual to individual. If you find that proof of plaintiffs' claims against Tyson Foods does not necessarily prove the claims of all the other hourly employees, then plaintiffs have not met their burden for those employees.

Authority

29 U.S.C. § 216(b) (FLSA collective action may be maintained by "any one or more employees for and in behalf of himself or themselves and other employees similarly situated"); *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 621 (8th Cir. 1991) (in actions where the evidence demonstrates that employees are subject to differing work situations that make pattern evidence unpersuasive, each plaintiff must meet his burden individually); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 952 (11th Cir. 2007) (to maintain a collective action under the FLSA "plaintiffs must demonstrate that the are 'similarly situated'"); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471-73 (11th Cir. 1982); *In re Food Lion*, 861 F Supp. 1263, 1272-74 (E.D.N.C. 1994); *Reich v. Southern Md. Hosp., Inc.*, 43 F.3d 949, 951-52 (4th Cir. 1995); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116, [sic] (4th Cir. 1985) (plaintiffs can present representative evidence to support an award of back pay to non-testifying employees); *Brock v. Norman's*

Country Market, Inc., 835 F.2d 823, 828 (11th Cir. 1988) (same); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 793-94 (1st Cir. 1991); *Beliz v. W. H. McLeod & Sons Packing Co.*, 765 F. 2d 1317, 1331 (5th Cir. 1985) ("Testimony of some employees concerning the hours worked by groups of non-testifying employees is sufficient if those who do testify have personal knowledge of the work performed by those who do not."); *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 86 (10th Cir. 1983) (plaintiffs' evidence was sufficient since at least one employee from each category testified or was deposed); *Saleen v. Waste Mgmt., Inc.*, Civ. No. 08-4959 (PJS/JJK), 2009 WL 1664451, at *6 (D. Minn. June 15, 2009) (at first-stage conditional certification, "the proper inquiry is whether Plaintiffs have shown a colorable basis that there is a single decision, policy, or plan affecting all of the individual employees"); *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 570-88 (E.D. La. 2008) (decertifying FLSA collective action after trial because evidence showed that employees were not similarly situated); *Resendiz-Ramirez v. P & H Forestry, LLC*, 515 F. Supp. 2d 937, 941 (W. D. Ark. 2007) (certification under the FLSA "typically requires a showing that the plaintiffs and potential class members were victims of a common decision, policy, or plan of the employer that affected all class members in a similar fashion."); *Chao v. Pac. Stucco, Inc.*, 2006 WL 2432862, at *3 (D. Nev. Aug. 21, 2006) ("A determination of whether the representative testimony adequately represents the class depends on the nature of the work involved, the working conditions and relationships, and the detail and credibility of the testimony.").

See Elizabeth M. v. Montenez, 458 F.3d 779, 786-87 (8th Cir. 2006) (discussing what Rule 23 class representative must eventually prove; "The presence of a common legal theory does not establish typicality when

proof of a violation requires individualized inquiry."); *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) ("If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question."); *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1191-93 (11th Cir. 2009) (time records showing gap time between punches and productive work not sufficient to establish common proof in Rule 23 class action where employee testimony varied regarding the non-work-related activities that took place during the gap periods and the various personal reasons that employees came in early and stayed late); *Blyden v. Mancusi*, 186 F.3d 252, 266-67 (2d Cir. 1999) (verdict sheet must require findings sufficient to support class-wide liability); *Cimino v. Raymark Indus.*, 151 F.3d 297, 312 (5th Cir. 1998) (class action device does not "alter the required elements which must be found to impose liability and fix damages (or the burden of proof thereon) or the identity of the substantive law."); *In re Welding Fume Products Liability Litig.*, 245 F.R.D. 279, 311 (N.D. Ohio 2007) (finder of fact must be able to "determine, on a class-wide basis, whether the defendant's conduct" was a violation toward every plaintiff); *see also Zapata v. IBP, Inc.*, 167 F.R.D. 147, 160 (D. Kan. 1996) (finding plaintiffs could not proceed as a class where they failed to identify an unlawful company-wide practice or policy). *See generally Vaughan v. Mortgage Source LLC*, No. CV 08-4737, 2010 WL 1528521, at *4 (E.D. N.Y. Apr. 14, 2010) ("Courts have repeatedly stated that Section 216(b)'s 'similarly situated' requirement is considerably less stringent than the requirements for class certification under Rule 23."); *Wacker v. Personal*

Touch Home Care, Inc., No. 4:08CV93, 2008 WL 4838146, at *2-3 (E.D. Mo. Nov. 6, 2008) (accord); *Flavel v. Svedala Indus., Inc.*, 875 F. Supp. 550, 553 (E.D. Wis. 1994) ("similarly situated requirement of Section 216(b) is considerably less stringent than" requirements of Rule 23).

* * * *

FINAL INSTRUCTION NO. 17

De Minimis Defense (Defendant)

Tyson Foods is required to pay for all compensable work unless it proves by a preponderance of the evidence that the amount of work was what is referred to as "*de minimis*."

The following factors are considered in determining whether work activities are "*de minimis*":

1. The practical administrative difficulty of recording the uncompensated time;

2. For each employee separately, the aggregate amount of *uncompensated* time spent each day on the activities;

3. The regularity of the uncompensated work.

This defense applies only where there are uncertain and indefinite periods of time involved that are of short duration and where the failure to count such time is due to considerations justified by industrial realities. There is no precise amount of time that may be denied compensation as *de minimis*. No rigid rule can be applied with mathematical certainty. Rather, common sense must be applied to the facts of this case.

In applying the factors I described, you may wish to consider the following questions:

1. What is the reasonable, not the actual, amount of daily time spent by an employee on the activities?

2. How much of that reasonable time was not compensated by Tyson Foods?

3. Was it administratively feasible to precisely record that time for payroll purposes?

Not all of the factors need to be proven for you to find that the activities were *de minimis*. Rather, if considering all of the factors on balance results in a finding that the time spent on donning, doffing, and washing activities is *de minimis*, employees will not be compensated for these activities beyond what you find they may already have been paid. In considering whether the total amount of time for which compensation is sought is *de minimis*, you should consider only the uncompensated time.

You should consider only the time that is spent on work. In other words, if an activity is not work, that time should be excluded from your *de minimis* analysis. For example, time spent donning and doffing items that are optional or primarily benefit the employee or socializing that may occur after donning, but before the start of production work, or after the end of production work, but before doffing, should be excluded.

In addition, you have heard testimony about employees being paid for non-production time, which they could use for their donning, doffing, and washing activities. In considering whether the total amount of unpaid time is *de minimis*, it is appropriate for you to include this paid non-production time in your analysis.

Authority

29 C.F.R. §785.47; 29 C.F.R. §785.48(a) ("Minor differences between the clock records and actual hours

worked cannot ordinarily be avoided, . ."); *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 692 (1946) ("compensable working time was limited to the minimum time necessarily spent . "); *Lindow v. United States*, 738 F.2d 1057, 1062-64 (9th Cir. 1984); *Singh v. City of New York*, 524 F.3d 361, 370-72 (2d Cir. 2008); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 n.1 (10th Cir. 1994); *Pressley v. Sanderson Farms*, No. Civ. A H-00-420, 2001 WL 850017, at *3 (S.D. Tex. Apr. 23, 2001), *aff'd*, 33 Fed. Appx. 705 (5th Cir. 2002); *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563-64 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002); *Musticchi v. City of Little Rock, Arkansas*, __F. Supp. 2d __, 2010 WL 3327998 at **9-11 (W.D. Ark. Aug. 24, 2010) (*de minimis* defense considers "the minimum time it takes to complete the task") (quoting *Anderson v. Mt. Clemens Pottery*); *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1317-21 (N.D. Ala. 2008); *Kassa v. Kerry, Inc.*, 487 F Supp. 2d 1063, 1067 n.1 (D. Minn. 2007); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 903-904 (9th Cir. 2003), *aff'd on other grounds*, 126 S. Ct. 514, 525 (2005); *Hesseltine v. Goodyear Tire & Rubber Co.*, 391 F. Supp. 2d 509, 518-20 (E.D. Tex. 2005); *Alvarez v. IBP, Inc.*, No. CT-98-5005-RHW, at *11 (E.D. Wash. Sept 14, 2001) ("compensable time for each activity is on the basis of a reasonable time, rather than the actual time required for each activity"; finding "reasonable time" to don and doff non-unique clothing such as "hard hats, earplugs, frocks, safety glasses, a hairnet, and boots" to be *de minimis*); *McComb v. C.A. Swanson & Sons*, 77 F. Supp. 716, 724, 736 (D. Neb. 1948) (applying *de minimis* doctrine based on the "time reasonably" required for the pre- and post-shift clothes changing activities); *Brock v. City of Cincinnati*, 236 F.3d 793, 804 (6th Cir. 2001) (in determining

application of the *de minimis* doctrine, the court considered the reasonable amount of time spent by the plaintiffs in performing the activities in question); *Saunders v. John Morrell & Co.*, 1991 WL 529542, at *5 ("These factors are not mechanical or rigid, but are flexible . . "); *Amos v. United States*, 28 Wage & Hour Cas. (BNA) 569, 575 (Ct. Cl. 1987) (plaintiffs entitled to payment only for the "amount of time reasonably required" to perform the activities in question); *McIntyre v. Joseph E. Seagram & Sons*, 72 F. Supp. 366, 372 (W.D. Ky. 1947) ("The evidence in this case conclusively shows that complainant, acting with reasonable dispatch, could, after punching in at the time clock, go to his locker, exchange a soiled for a clean uniform, change his clothing and report to his foreman ready for productive work in from 10 to 20 minutes. Such time is within the *de minimis* rule.").

* * * *

FINAL INSTRUCTION NO. 23

Damages (Defendant) [Provisional: Defendant Offers The Bracketed Portion Of This Instruction Only If The Court Denies Its Motion For Summary Judgment On The Meal-Period Claim]

If you find that plaintiffs have proven their claims, and that Tyson Foods has failed to prove that the employees' activities were *de minimis*, then you must turn to the question of damages.

Plaintiffs have the burden of proving damages and will have carried their burden only if they prove that the employees have in fact performed work for which they were not paid and produce sufficient evidence to show the amount and extent of such work as a matter of just and reasonable inference.

The burden then shifts to Tyson Foods to come forward with evidence of the precise amount of uncompensated work performed or with evidence to negate the reasonableness of the inference to be drawn from the plaintiffs' evidence. If Tyson Foods fails to produce such evidence, you may then award damages to the employees even though those damages will only be approximate.

If you find that the activities in issue are compensable, any employee who already has received full compensation for all those activities is not entitled to recover any damages. If you find that such compensation was not sufficient to cover *all* of the activities at issue, all uncompensated work should be taken into account in calculating damages.

An employee's "regular rate" during a particular week is the basis for calculating any overtime pay due for that week. The "regular rate" for a week is determined by dividing the first 40 hours worked into the total wages paid for those 40 hours. The overtime rate, then, would be one and one-half of that rate and would be owed for each hour in excess of 40 hours worked during the work week.

Authority

Anderson v. Mt. Clemens Pottery Co., 338 U.S. 680, 687 (1946); 29 U.S.C. §§ 207(a)(1), 207(e), 254(b); 29 C.F.R. §§ 778.110, 790.5(a), 790.7(a); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28, 37 (2005) (an employer must generally compensate employees for the time between their first and last principal activity, but affirming lower courts' awards limiting the damages to the time reasonably spent on the donning and doffing-related activities).

* * * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

[Filed: 10/07/10]

Docket No. 5:07-CV-04009 JAJ

PEG BOUAPHAKEO, et al. individually and on behalf of a class of others similarly situated,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

JURY VERDICT FORM

I. PLAINTIFFS' CLAIMS

1. *Question 1*. Have the plaintiffs proved by a preponderance of representative evidence for every class member that donning, doffing and rinsing of standard safety and sanitary items are "work"?

Federal Plaintiffs	Yes___	No___
Iowa Plaintiffs	Yes___	No___

If your answer to Question 1 is "no", answer no more questions. Sign and date this verdict form because you have completed your deliberations in this case. If you answered "yes", then answer Question 2 below.

Question 2. Have the plaintiffs proved by a preponderance of representative evidence for every class member that donning, doffing and rinsing of standard safety and sanitary items are "integral *and* indispensable" to their production jobs?

Federal Plaintiffs Yes___ No___

Iowa Plaintiffs Yes___ No___

If your answer to Question 2 is "no", answer no more questions. Sign and date this verdict form because you have completed your deliberations in this case. If you answered "yes", then answer Question 3 below.

Question 3. Have the plaintiffs proved by a preponderance of representative evidence for every class member that they have not received full compensation for their work activities in weeks in which they worked 40 or more hours?

Federal Plaintiffs Yes___ No___

Iowa Plaintiffs Yes___ No___

If your answer to this Question 3 is "no", answer no more questions. Sign and date this verdict form because you have completed your deliberations in this case. If you answered "yes", then answer Question 4 below.

II. TYSON'S DEFENSE

Question 4(a). Has Tyson Foods proved by a preponderance of the evidence that any uncompensated "work" time in the *Kill* area is *de minimis*?

Yes___ No___

A "yes" answer means that no further compensation is owed to plaintiffs who worked in these departments. A "no" answer means that further compensation is owed to plaintiffs who worked in these departments.

Question 4(b). Has Tyson Foods proved by a preponderance of the evidence that any uncompensated "work" time in the *Cut/Retrim (also known as Fabrication)* area is *de minimis*?

YES___ NO___

A "yes" answer means that no further compensation is owed to plaintiffs who worked in these departments. A "no" answer means that further compensation is owed to plaintiffs who worked in these departments.

III. DAMAGES

Answer the following question *only* if you answered "no" to either part of Question 4.

Question 5. How much additional compensation does Tyson Foods owe? $_____

Signature of Foreperson:_____

DATE: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

[Filed: 10/13/10]

No. 5:07-cv-04009 JAJ

PEG BOUAPHAKEO et al., individually and
on Behalf Of Themselves and
All Other Similarly Situated Individuals,

Plaintiffs,

v.

TYSON FOODS, INC.

Defendant.

DEFENDANT'S AMENDED AND CORRECTED INSTRUCTION NO. 11

COMES NOW Defendant Tyson Foods, Inc. and files the attached amended and corrected version of its Instruction No. 11 previously submitted.

* * * *

FINAL INSTRUCTION NO. 11

(Amended and Corrected)

Work

Federal law requires Tyson Foods to pay employees for all hours worked. You must decide whether Plaintiffs have proved that putting on, taking off and washing items is "work." Work is any (1) physical or mental exertion, whether burdensome or not, (2) controlled or required by the employer and (3) pursued necessarily and primarily for the benefit of the employer and its business. Exertion is not required in circumstances where the employer requires the employee to report to the workplace at a certain time and the employee waits to be engaged.

Authority

IBP, Inc. v. Alvarez, 546 U.S. 21, 25-28 (2005); *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1361 (8th Cir. 1993); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125 (10th Cir. 1994); *Smith v. Aztec Well Serv. Co.*, 462 F.3d 1274 (10th Cir. 2006)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

[Filed: 10/14/10]

No. 5:07-cv-04009 JAJ

PEG BOUAPHAKEO et al., individually and
on Behalf Of Themselves and
All Other Similarly Situated Individuals,

Plaintiffs,

v.

TYSON FOODS, INC.

Defendant.

DEFENDANT'S AMENDED AND CORRECTED INSTRUCTION NO. 12

COMES NOW Defendant Tyson Foods, Inc. and files the attached amended and corrected version of its Instruction No. 12 previously submitted.

* * * *

AMENDED AND CORRECTED FINAL INSTRUCTION NO. 12

Preliminary vs. Principal Activity (Defendant)

There is an exception to the general rule that employers must pay for all work. Employers do not have to pay an employee for activities that are preliminary—that is, that occur before the employee performs his or her first principal activity of the day, or for activities that are postliminary—that is, that occur after the employee performs his or her last principal activity of the day.

In certain circumstances, activities that occur before or after a scheduled shift may be compensable provided they are both integral *and* indispensable to the production work for which the employee is employed to perform.

Plaintiffs must prove by a preponderance of the evidence that any pre-shift or post-shift activity that they claim is a first or last principal activity is integral and indispensable to the production work for which the employee is employed. Whether an activity is integral and indispensable depends on the existence of three factors: (1) the activity must be required by the employer, (2) the activity must primarily benefit the employer, and (3) the activity must be essential to complete the work the employee is required to perform. Plaintiffs must prove the existence of all three factors.

The fact that an activity is necessary for the employee to engage in his or her principal activity—as opposed to essential to completing the principal activity—does not make the activity integral. When "performed under the conditions normally present," changing clothes and washing up are not an integral and indispensable part of the employee's principal activities. To decide

whether Tyson Foods primarily benefits from an activity, it is not enough for Tyson Foods to have received some benefit from the activity or that Tyson Foods and the employee equally benefit. Rather, Tyson Foods must receive the primary benefit of an employee's donning, doffing, and washing.

Authority

29 U.S.C. § 254(a); 29 C.F.R. § 790.7; *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47, 50-51 (8th Cir. 1984) (examples of noncompensable activities specifically enumerated in the Senate report on the Portal Act as being outside the workday include changing clothes, washing up and showering) (citing *Dunlop v. City Electric, Inc.*, 527 F.2d 394, 398 (5th Cir. 1976)); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 23, 39 (2005) ("the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are integral and indispensable "); *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956); *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340, 1342-45 (11th Cir. 2007); *In re Tyson Foods, Inc.*, 694 F. Supp. 2d 1358, 1363-66 (M.D. Ga. 2010); *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1311-15 (N.D. Ala. 2008); *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 592-94 (2d Cir. 2007); *Pirant v. United States Postal Serv.*, 542 F.3d 202, 208-209 (7th Cir. 2008); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 (10th Cir. 1994); *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 399-400 (5th Cir. 1976); *Musticchi v. City of Little Rock, Arkansas*, __ F. Supp. 2d __, 2010 WL 3327998 at **7-8 (W.D. Ark. Aug. 24, 2010) (following Gorman) (while cleaning equipment may be necessary or indispensable to the job, employees could successfully do their jobs without cleaning, and thus these activities were not integral); *Anderson v. Pilgrim's Pride*

Corp., 147 F. Supp. 2d 556, 562-63 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002); *Pressley v. Sanderson Farms*, No. Civ. A H-00-420, 2001 WL 850017, at *2-3 (S.D. Tex. Apr. 23, 2001), *aff'd*, 33 Fed. Appx. 705 (5th Cir. 2002); *Reich v. Oscar Mayer Foods Corp.*, No. 4:93cv204, 1995 WL 1765643, at *2 (E.D. Tex. Mar. 2, 1995); *McComb v. C.A. Swanson & Sons*, 77 F. Supp. 716, 731-32 (D. Neb. 1948).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION - SIOUX CITY

[Filed: 10/14/10]

Civil No. 5:07-cv-04009-JAJ-TJS

PEG BOUAPHAKEO, et al.,

Plaintiffs,

vs.

TYSON FOODS, INC.,

Defendant.

ORDER FOR FINAL PRETRIAL CONFERENCE

* * * *

V. LEGAL CONTENTIONS

A. Plaintiff's Legal Contentions:

1. To prevail, plaintiffs are not required to establish that each of the contested activities are "work" or "integral and indispensable" to a principal activity because all activities occurring after the first such integral and indispensable activity are automatically compensable as part of the Department of Labor's "continuous workday" rule that the Supreme Court recognized in *IBP v. Alvarez*, 546 U.S. 21, 29 n.3 (2005) ("'Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked.'", quoting 29 C.F.R. § 790,6(a)); *see also id.* at 38 (holding that

"during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is . covered by the FLSA.").

2. For knife-wielding employees, plaintiffs contend that the first compensable act that begins the continuous workday is the act of obtaining and donning one or more items of the company-issued gear and equipment that has already been held to be compensable, and that the Storm Lake plant was permanently enjoined from treating as non-compensable in *Reich, supra*. All other activities at issue in this case for knife-wielding employees follow such compensable knife-related activities and are therefore automatically compensable as part of the Department of Labor's "continuous workday" rule set forth above. Plaintiffs contend the same analysis applied to non-knife wielding plaintiffs based on their obtaining and donning one or more items of their sanitary gear and equipment at the start of their shift which commences the continuous work day for which compensation must be paid for all the remaining activities at issue in this case.

3. Plaintiffs contend that defendant Tyson is collaterally estoppel from denying the compensability of the knife-related gear and activities held to be compensable, and enjoined to be compensated at the Storm Lake Plant in *Reich v. IBP*, 820 F.Supp. 1315 (D. Kan. 1993), *affirmed* 38 F.2d 1123 (10th Cir. 1994); *remedies on remand*, 1996 WL 137817 (D. Kan. 1996), *affirmed sub. nom., Metzler v. IBP, Inc.*, 127 F.3d 959 (10th Cir. 1997).

4. Plaintiffs request that the calculation of individual amounts of backpay for each plaintiff and class member be bifurcated so that the jury trial will be limited to the issues of liability, the number of minutes it

takes to perform the contested activities, and the number of such minutes that have not been paid. With those determinations, the individual backpay amount for each class member will be a ministerial matter based on arithmetic and the defendant's computerized time and payroll records.

5. The defendant has notified plaintiffs that it does not contest whether the plaintiffs have satisfied the wilfulness standard for extending the limitations period to three years for all plaintiffs, opt-in plaintiffs and class members.

6. The defendant has withdrawn any contention or defense of good faith.

7. The trial of this case involves no issue related to class or collective certification or decertification. Those issues have been resolved in this Court's class certification decision reported as *Bouaphakeo v. Tyson Foods, Inc.*, 564 F.Supp.2d 870 (N.D. Iowa 2008). Class and collective certification and decertification would be procedural issues for the Court, not a jury.

8. Plaintiffs' other legal contentions are set forth in the Section IV.A above as part of plaintiffs' Factual Issues.

B. Defendant's Legal Contentions:

1. Donning, doffing, and washing of standard sanitary and protective items (e.g., frock, whites, hard hat, hair net, ear plugs, boots, safety glasses, plastic apron, plastic sleeves, cotton gloves, plastic gloves) are not "work." Such activities do not require physical or mental exertion. Some of the items at issue are not required in certain positions and are worn only at the employee's choice for their comfort or convenience. Some items can be worn from and to home. The safety

5. In addition, many of the Plaintiffs have already been paid for some or all of the activities through the payment of "K code" time that was specifically intended to compensate for the activities at issue.

6. Even if Tyson were liable to some or all of the named Plaintiffs, there is no class-wide liability, either to the FLSA opt-ins or to the state-law Plaintiffs. The Plaintiffs are not similarly situated, in that there was no common decision, policy or plan that violated the FLSA. In addition, each Plaintiff presents individualized circumstances. There is no common evidence that supports class-wide liability and does not vary from individual to individual. The Court's prior conditional certifications of the two classes does not bind the jury, and the plaintiffs are required to prove at trial the elements of their claims for each class member to recover on a class-wide basis.

7. Defendant opposes Plaintiffs' requested bifurcation of damages from the liability phase of the trial. Plaintiffs first raised this issue on October 14, 2010, after both sides had exchanged proposed jury instructions on the damages issue and had listed multiple trial exhibits relating to damages. Bifurcation would unduly prejudice Defendant because one of its defenses is that it has already paid for some or all of the activities at issue. Bifurcation at this late date should also be denied as a waste of resources.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

Docket No. 5:07-CV-04009 JAJ

PEG BOUAPHAKEO, MARIO MARTINEZ
JAVIER FRAYRE, HERIBENTO RENTERIA,
JESUS A. MONTES, and JOSE A. GARCIA,
individually behalf of a class of
others similarly situated,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

PARTIES' JOINT STIPULATION OF FACTS

I. STIPULATED FACTS: The parties agree that the following facts are true and undisputed:

1. Tyson Fresh Meats, Inc. is a wholly-owned subsidiary of Tyson Foods, Inc.

2. Tyson Fresh Meats, Inc. owns and operates a pork-processing facility in Storm Lake, Iowa, where hogs are slaughtered and processed.

3. Tyson Foods, Inc. is a Delaware corporation, with its principal place of business in Arkansas.

4. Tyson Fresh Meats, Inc. is a Delaware corporation, with its principal place of business in South Dakota.

5. Tyson Foods has been engaged in interstate commerce or in the production of goods for interstate commerce throughout the relevant time period.

6. The "production" areas of the Storm Lake plant include Kill, Cut, and Re-trim.

7. This case was brought by six named Plaintiffs: Peg Bouaphakeo, Mario Martinez, Javier Frayre, Heribento Renteria, Jesus Montes, and Jose Garcia.

8. The six named Plaintiffs are pursuing this case as a class action. The named plaintiffs are seeking to make a claim on behalf of all of the employees under Iowa law. In addition, some of the employees in this case are making a claim under a federal law known as the Fair Labor Standards Act.

9. The Iowa plaintiffs are those current and former hourly production employees who worked in the Kill, Cut or Retrim areas of the Storm Lake plant at some point between February 7, 2005 and July 3, 2008, although they may have continued to work after that date as well. This is known as the "state class" or "Iowa class." There are 3,344 employees in this class.

10. The federal plaintiffs are those current and former hourly, production employees who worked in the Kill, Cut or Retrim areas of the Storm Lake facility at some point after March 31, 2004, and who filed consent-to-join forms with the Court on or after March 31, 2007. This is known as the "federal class" or "the "FLSA class" There are 444 employees in this class, including the six named Plaintiffs.

11. The main production departments at the Storm Lake facility are the kill department, the cut department, and the "re-trim" department. These three departments contain approximately 1,300 hourly workers.

Each of these departments typically run two shifts daily.

12. Approximately 1,300 hourly workers are employed in the Kill, Cut, and Re-trim production areas at the Storm Lake facility.

13. The Kill, Cut, and Re-trim production areas at the Storm Lake facility operate on both an A shift and B shift.

14. Both shifts of the kill department total approximately 380-400 hourly workers. Both shifts of the cut department total approximately 440-460 hourly workers. Both shifts of the Re-trim department total approximately 440-450 hourly workers.

15. The kill department slaughters the hog, removes the internal organs, sends the head, feet and internal organs to the evisceration room, and sends the carcass to the cooler for cold storage. The carcass is the two "sides" of the hog which contain edible meat. The cut department breaks the chilled carcass down into its "primal pieces" which is smaller parts such as front shoulder, loins, bellies, hind quarters and hams. Some items are packed for shipment to customers or other Tyson plants in the cut department and others are sent to the Re-trim department for further processing. The retrim or conversion department involves the further processing of hams and loins and additional trimming of those products.

16. Employees using required [sic] to don, doff and wear or use some knives on the job are combination of a plastic belly guard, mesh apron, mesh sleeve, plexiglass arm guard, mesh glove, Polar glove, membrane skinner gloves, Polar sleeves, "steel" for maintaining knives, and knife scabbards ("knife-related" items, equipment or activities hereafter).

17. Employees are required to stow such knife-related items and equipment in their lockers at the end of their shift except for items that require or need laundering or items that require or need replacement

18. "Sanitary items" include such items as the frock, hairnet, beard net, cotton and rubber gloves, rubber apron and rubber sleeves.

19. Hourly production workers are required to wear a hard hat, a hairnet, a beard net (if they have facial hair), and earplugs or ear muffs while on the production floor. Additional items required to be worn are listed on a form for each particular position known as a Job Safety Analysis, or JSA.

20. Non-knife wielding employees may also don and doff rubber gloves, cotton gloves and rubber or plastic aprons.

21. Workers in the Cut and Re-trim processing areas are required to wear a fabric frock over their street clothes while on the production floor.

22. Workers in the Kill area wear a fabric white shirt and pants ("whites") provided by Tyson, except that workers may choose to wear their own light-colored shirt and pants instead of the Tyson-issued.

23. Production employees go to their lockers at the start of their shift to obtain their individual supply bag in which Tyson has put their sanitary items and equipment that requires laundering between shifts, such as the company-issued frock, cotton gloves, Polar gloves, and Polar sleeves.

24. Knife-wielding employees must also go to their lockers at the start of their shift to retrieve their knife-related items and equipment.

25. The parties agree that donning, doffing and rinsing the following items is compensable: mesh apron, belly guard, steel, scabbard, mesh glove, Polar glove, Polar sleeve, plexiglass arm guard, mesh sleeve, and membrane skinner gloves.

26. There are time clocks located at the entrances of the kill, cut and re-trim departments.

27. At all relevant times, Tyson has had a policy and practice requiring workers to swipe an identification card each day, before and after their shift. The swipe generally is used to register attendance.

28. The production time for which an employee is paid may be less than the time between the swipe in and swipe out, but the swipe in/swipe out does not measure production time.

29. Although the time clocks record the time that hourly workers punch the clock to the minute, Tyson does not use such recorded time to determine an employee's compensable hours or pay. The time clocks are generally used to record attendance.

30. Workers are required to be at their work stations on the production floor at their scheduled start time.

31. Employees are not supposed to perform work on the production line without wearing all of the required sanitary and protective items and equipment for their position. They are disciplined if they are not wearing their required sanitary and protective items and equipment.

32. Employees are also required to remove some of their sanitary and protective items and equipment, including their frock (if applicable) before entering the rest room. Employees are only permitted to wear their

white shirt and pants, hair net, hard hat, earplugs, and boots into the restroom (whether personally provided or company-provided).

33. From 1998 until February 4, 2007, Tyson paid four "extra" minutes beyond production time to all production employees as compensation for donning and doffing and related activities. Tyson calls this "K Code" time.

34. On February 4, 2007, the company added its calculation of the pre- and post-shift walking time at the Storm Lake facility to the amount of time employees in various job positions were determined in 1998 to spend performing the various pre- and post-shift activities.

35. From February 4, 2007 to June 28, 2010, Tyson ceased paying non-knife-wielding employees for their time spent donning and doffing company-issued sanitary and protective items and equipment.

37. From February 4, 2007 to June 28, 2010, Tyson paid knife wielding employees between 4 and 8 extra minutes in addition to production time for donning and doffing their protective items and equipment and related activities.

38. After February 4, 2007, K code time ranged from 4 to 8 minutes a day for anyone who received it, and the amount of time depended on the job; employees who did not work with a knife received no K code time after February 4, 2007.

39. Prior to February 4, 2007, K code time was intended by Tyson to compensate employees who worked in any department where a knife was used for donning, doffing, and rinsing of certain equipment that is unique to the meat-processing industry. Specifically, the 4 minutes of K code time was intended to

pay for time spent on the following activities: pre- and post-shift donning and doffing of the mesh apron, belly guard, steel, scabbard, mesh glove, Polar glove, Polar sleeve, plexiglass arm guard, mesh sleeve, and membrane skinner gloves; post-shift gathering of the equipment just mentioned; walking from the production line to the wash stations; post-shift waiting at the wash stations and rinsing of clothing and equipment; and pre- and post-shift "dipping" of some equipment in a sterilizing solution and any time spent waiting at the dip tanks.

40. Starting February 4, 2007, K code time was paid only to employees who used a knife, but the number of minutes was increased to cover the time spent walking before shift from the locker room to the production floor, and walking after shift from the wash station to the locker room.

41. Before June 28, 2010, production workers at Storm Lake got two breaks during a typical 8- hour shift. The first break was a paid 15-minute break, and the second break was an unpaid 30 minute break.

44. Production employees at the Storm lake facility are "guaranteed hours" of paid time up to a certain number of hours per week for a certain number of weeks per year that they reported to work.

45. Hourly workers at the Storm Lake plant tend to work a significant amount of overtime on a weekly basis.

46. Hourly, non-clerical employees who work 40 or more hours in a week are entitled to be paid overtime at a rate of time-and-one-half of their regular rate of pay.

47. Wage rates at the Storm Lake plant for hourly production employees in 2009 ranged from a starting wage of $11 per hour to a maximum of $15.50 an hour.

TIMES DETERMINED BY DR. MERICLE FOR FABRICATION DEPARTMENT

TABLE 5 OF REPORT

ACTIVITY NUMBER	ACTIVITY	AVERAGE TIME (MINUTES & HUNDREDTHS)	OBSERVATIONS
1	Don equipment preshift at locker	4.56	88
2	Dip scabbard and wash hands	0.17	120
4	Don equipment preshift in department	2.38	23
5	Doff equipment pre lunch	0.78	159
6	Don equipment post lunch	2.40	76
7	Doff/clean equip post shift in department	1.30	28
8	Inspect and disinfect at door post shift	0.10	18
9	Doff/store equipment post shift in locker room	3.40	21
10	Total walking time	2.92	N.A.

Total Donning, Doffing, Washing & Walking **18.00 Minutes**

TIMES DETERMINED BY DR. MERICLE FOR KILL DEPARTMENT

TABLE 6 OF REPORT

ACTIVITY NUMBER	ACTIVITY	AVERAGE TIME (MINUTES & HUNDREDTHS)	OBSERVATIONS
11	Don equipment preshift at locker	6.40	51
12	Don equipment preshift in department	2.06	11
13	Doff equipment pre lunch	1.22	44
14	Don equipment post lunch	2.14	38
15	Doff/clean equip post shift in department	2.37	52
16	Doff post shift at locker	3.53	15
20	Total walking time	3.54	N.A.

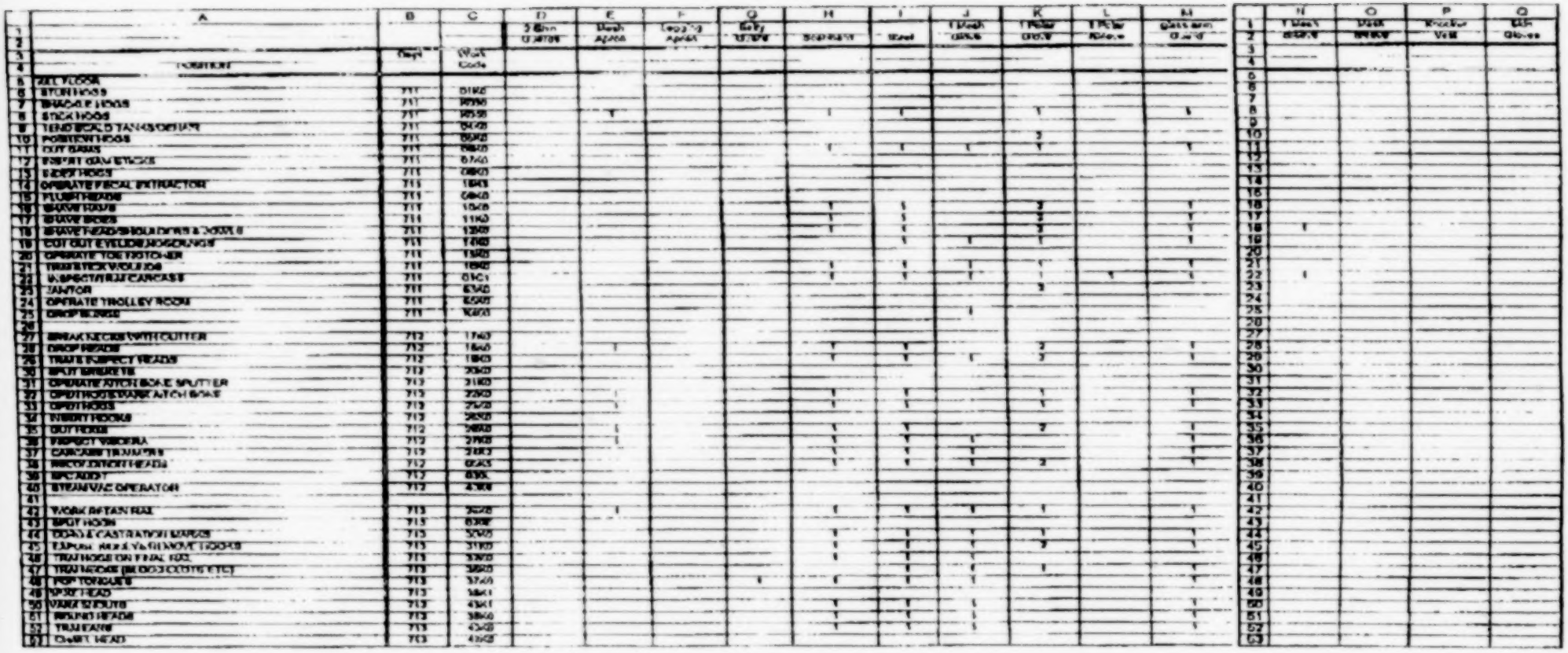
Total Donning, Doffing, Washing & Walking **21.25 Minutes**

From: Sandoval, Jorge
Sent: Tuesday, June 5, 2007 10:52 AM
To: Garcia, Michelle
Subject: FW: STL Equip Lists
Attachments: STL Equip Lists.xls

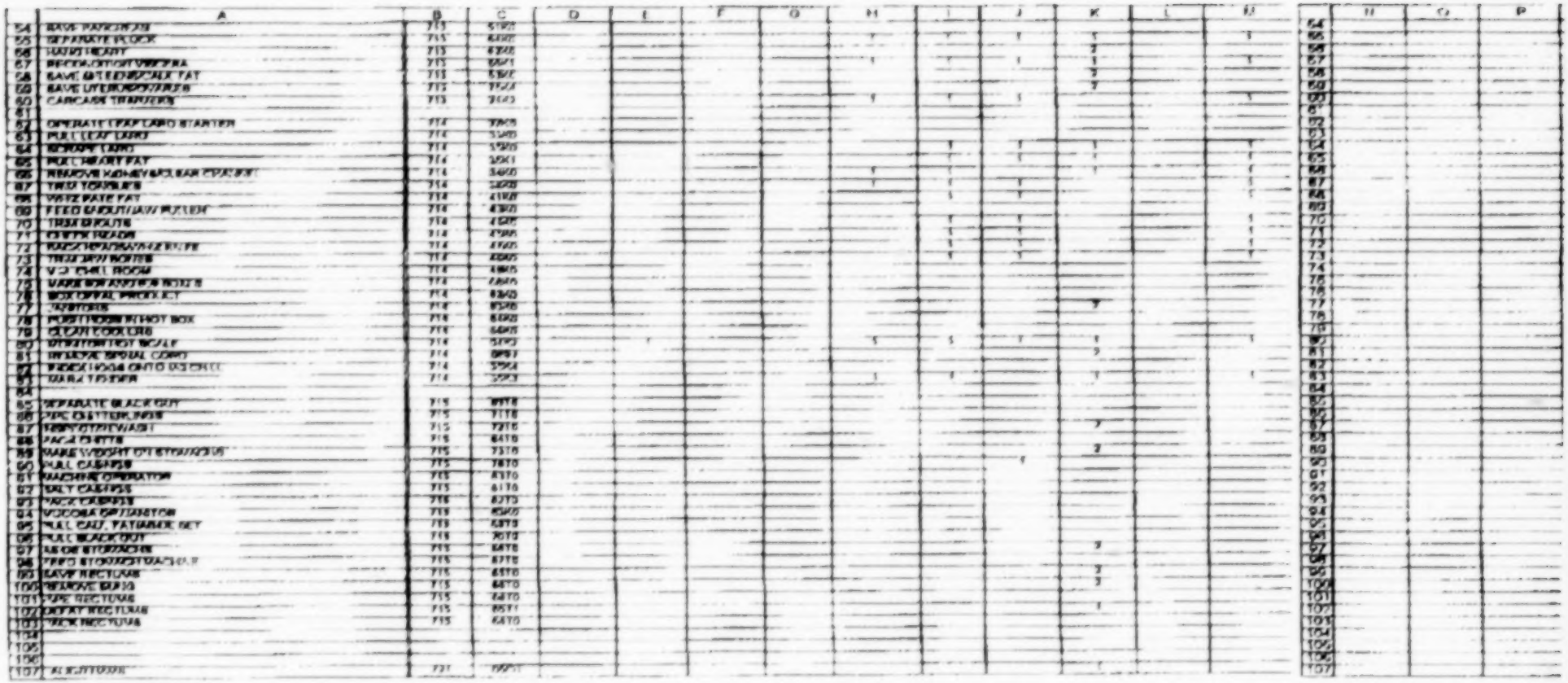
FYI every job we have in the plant, required PPE

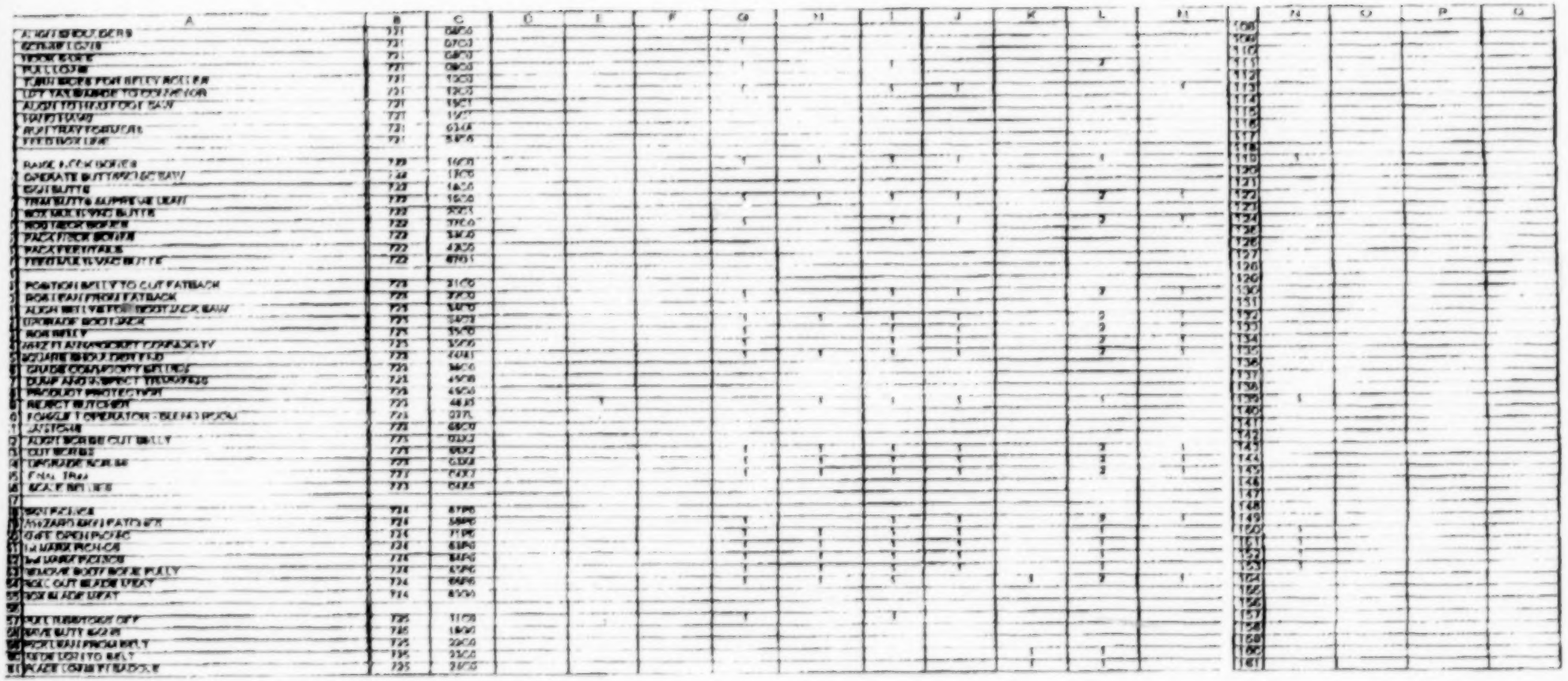
From: Rahman, Masudur
Sent: Tuesday, June 5, 2007 10:16 AM
To: Sandoval, Jorge
Subject: STL Equip Lists

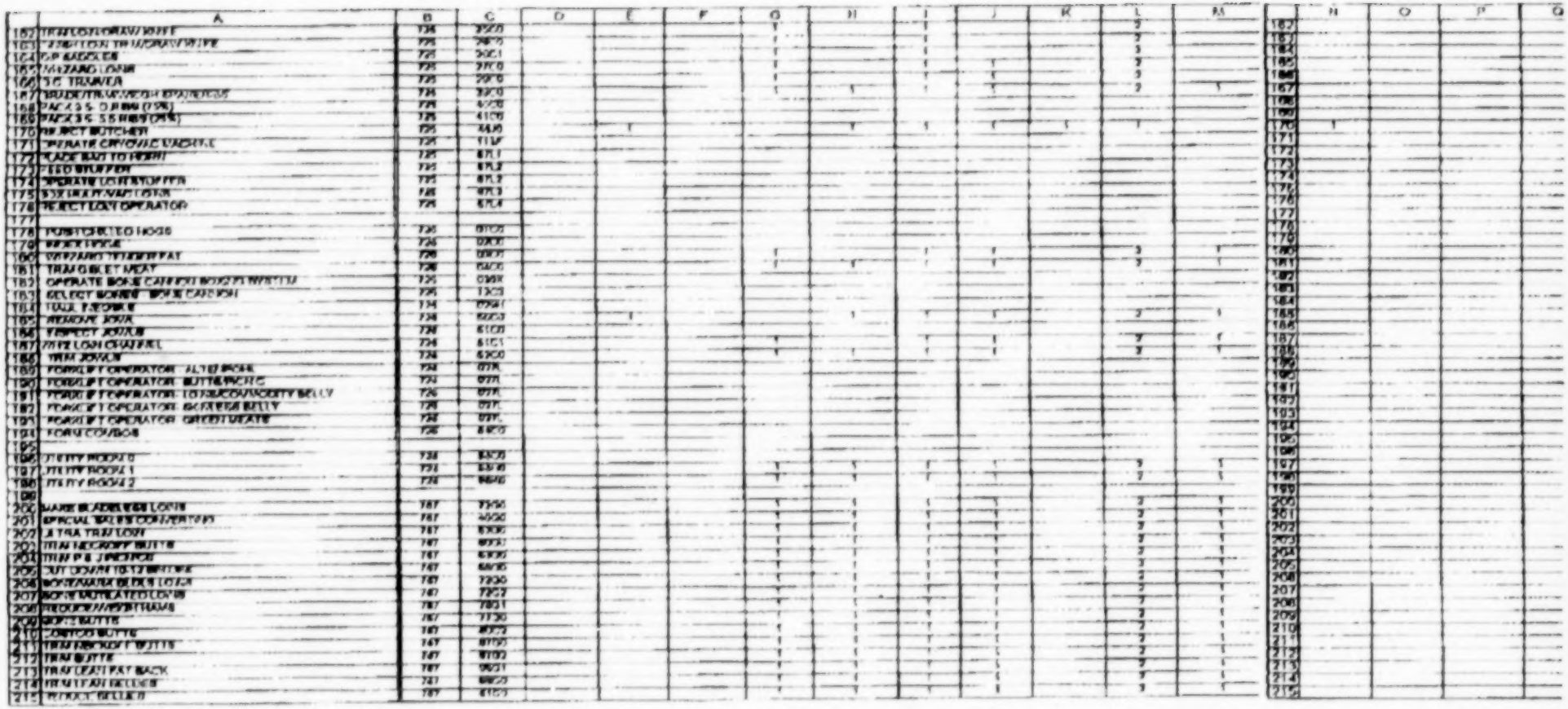
Please verify

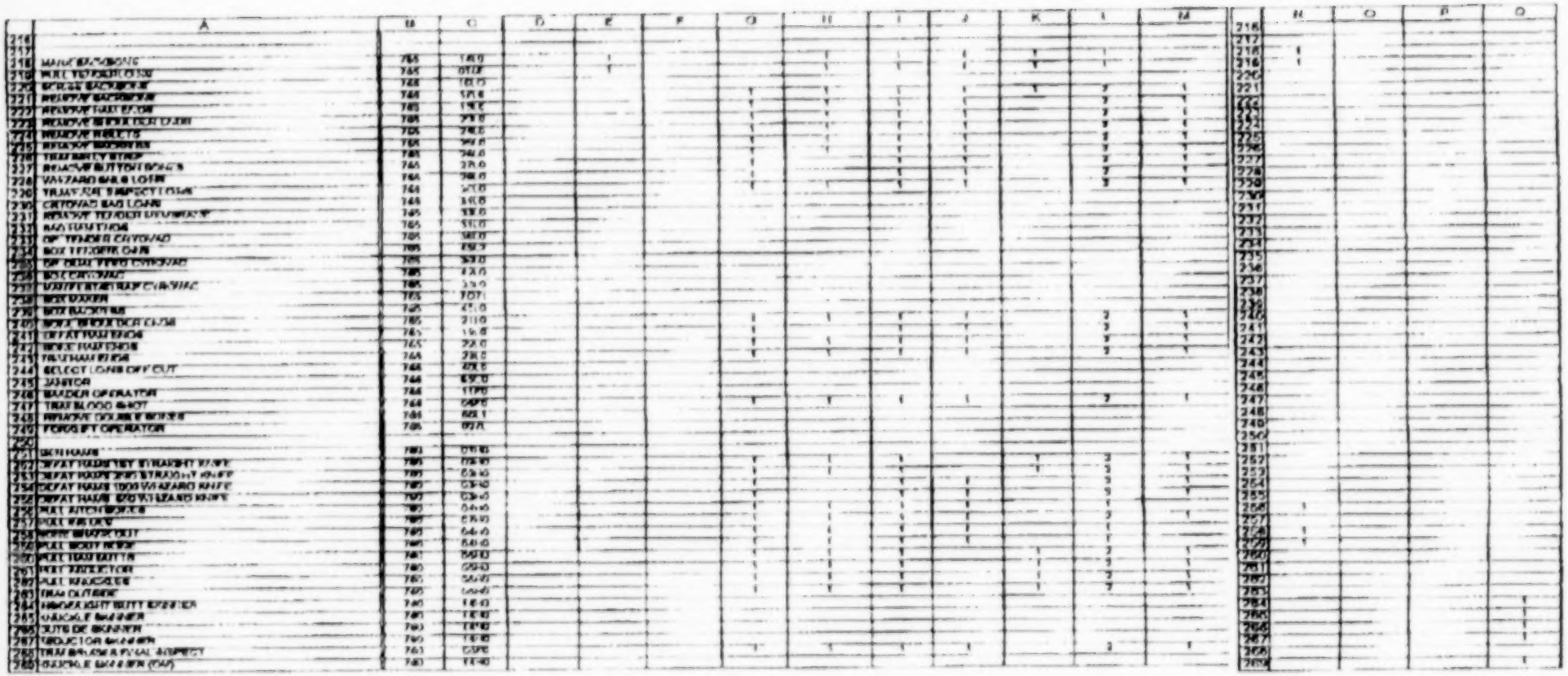


127

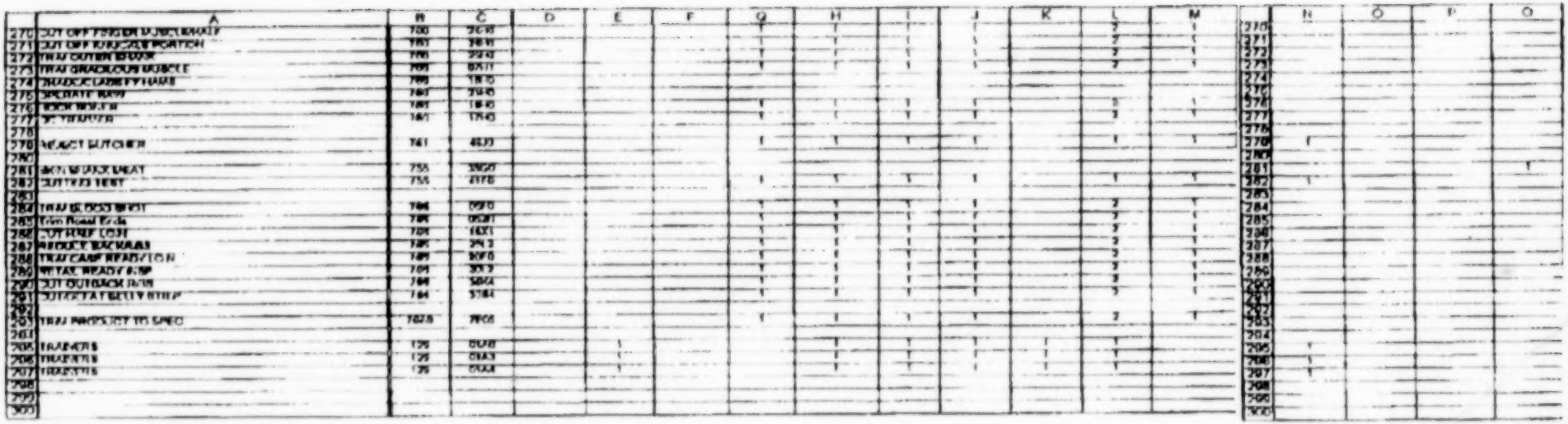






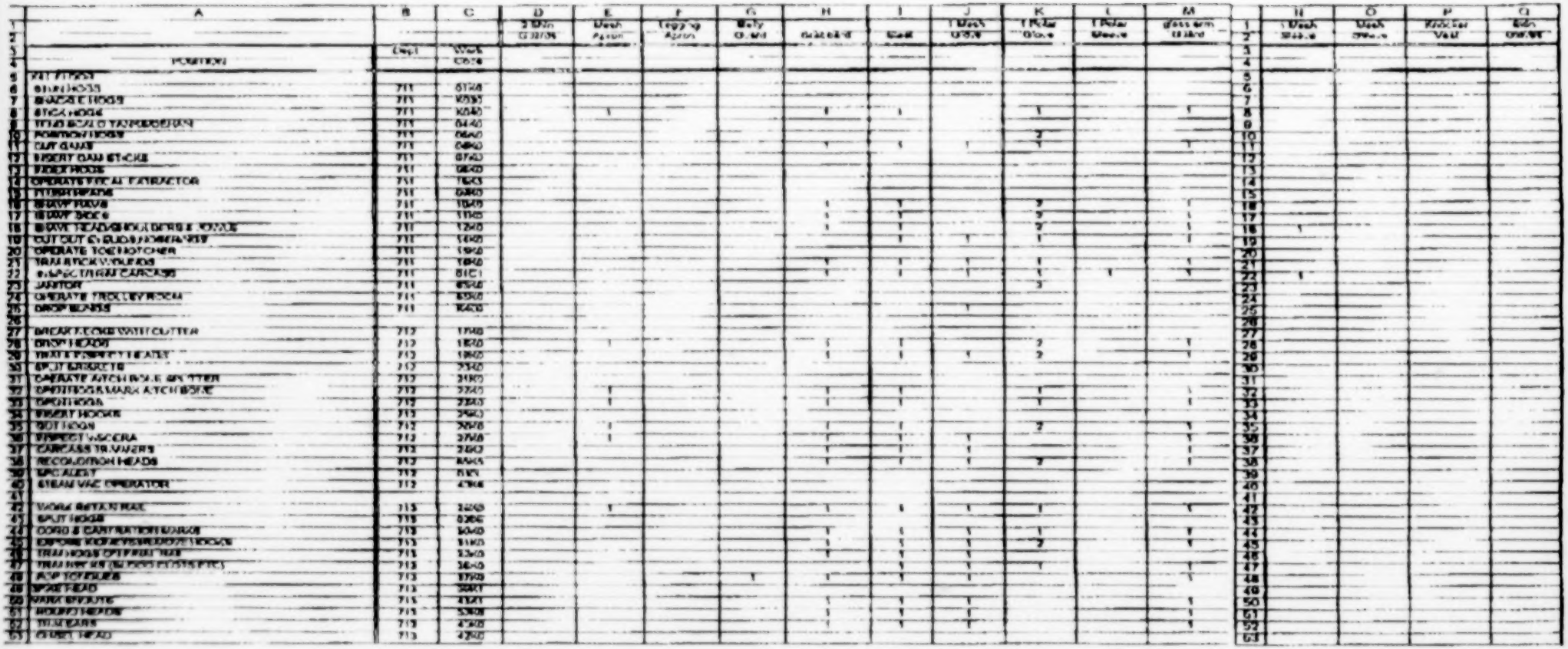


131

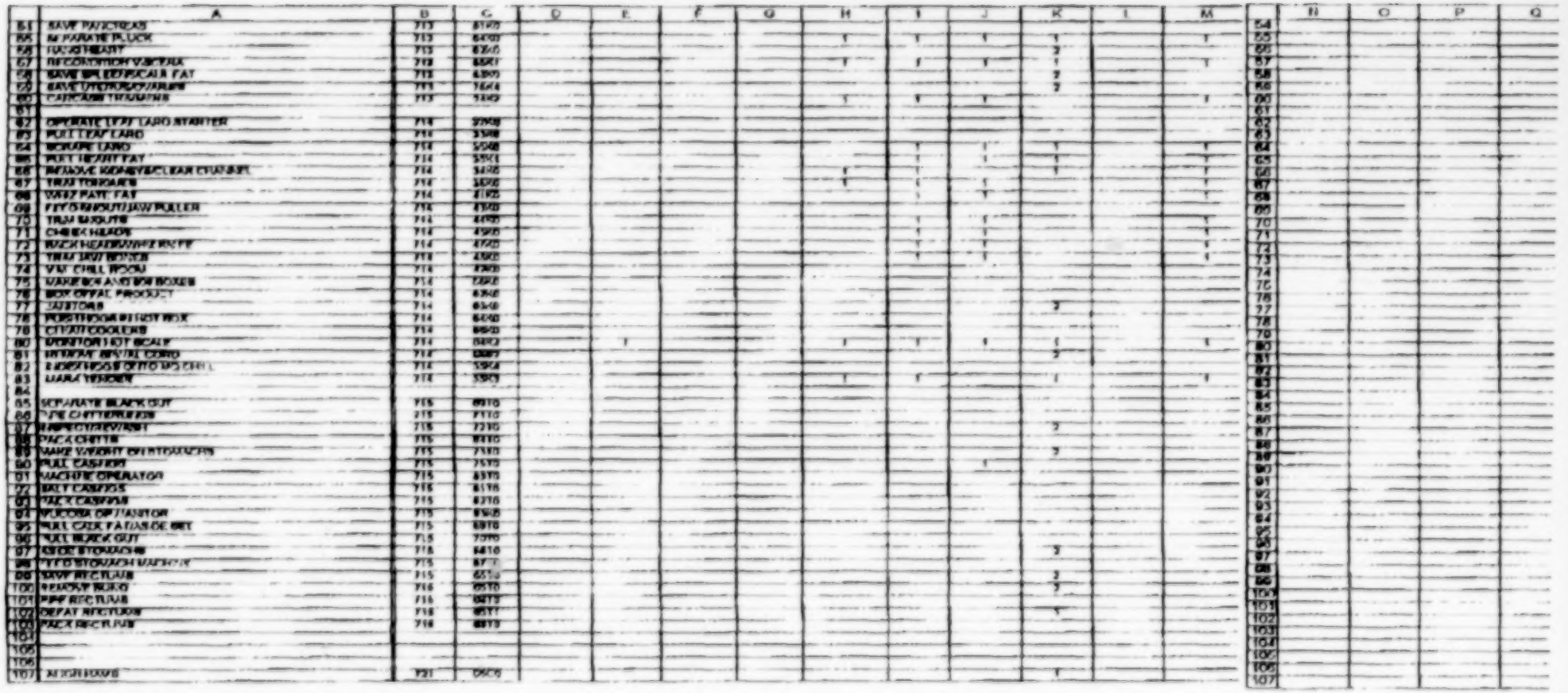


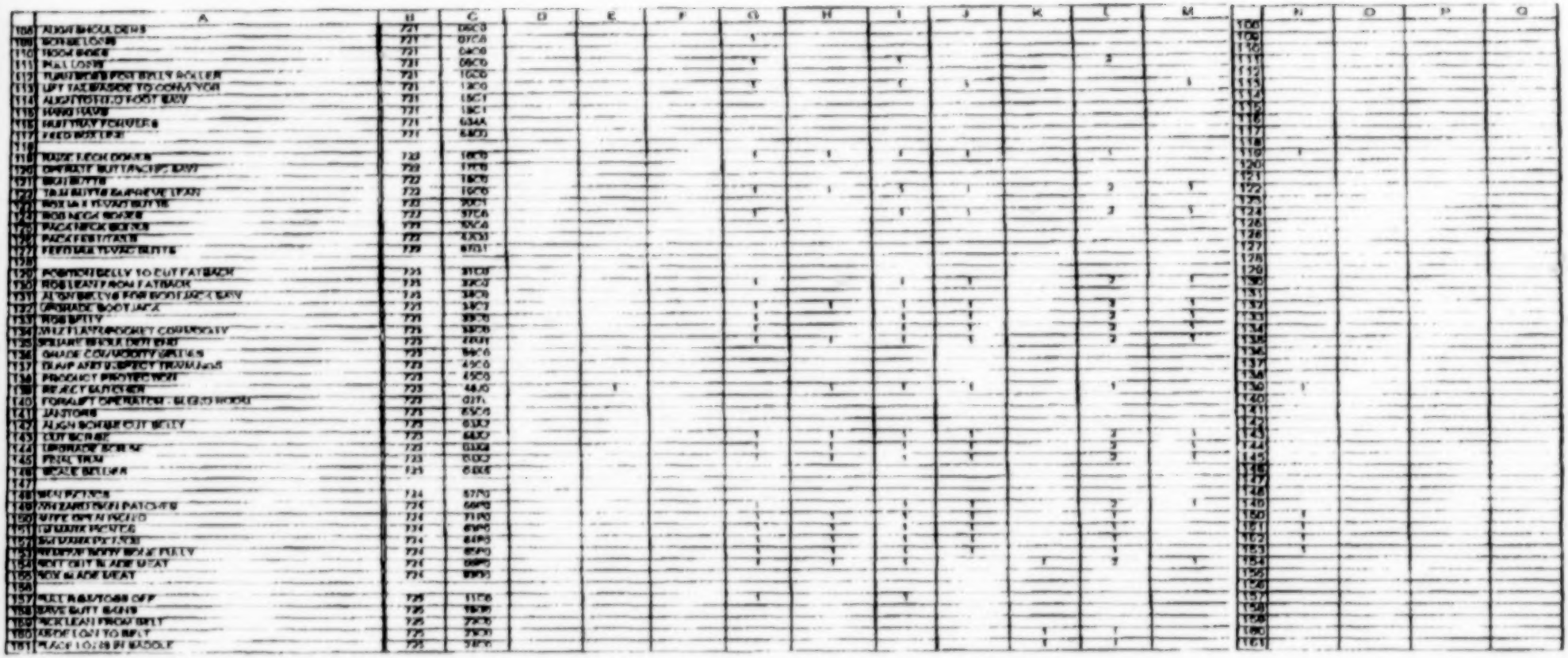
From:	Rahman, Masudur
Sent:	Tuesday, June 05, 2007 10:16 AM
To:	Sandoval, Jorge
Subject:	STL Equip Lists
Attachments:	STL Equip Lists.xls

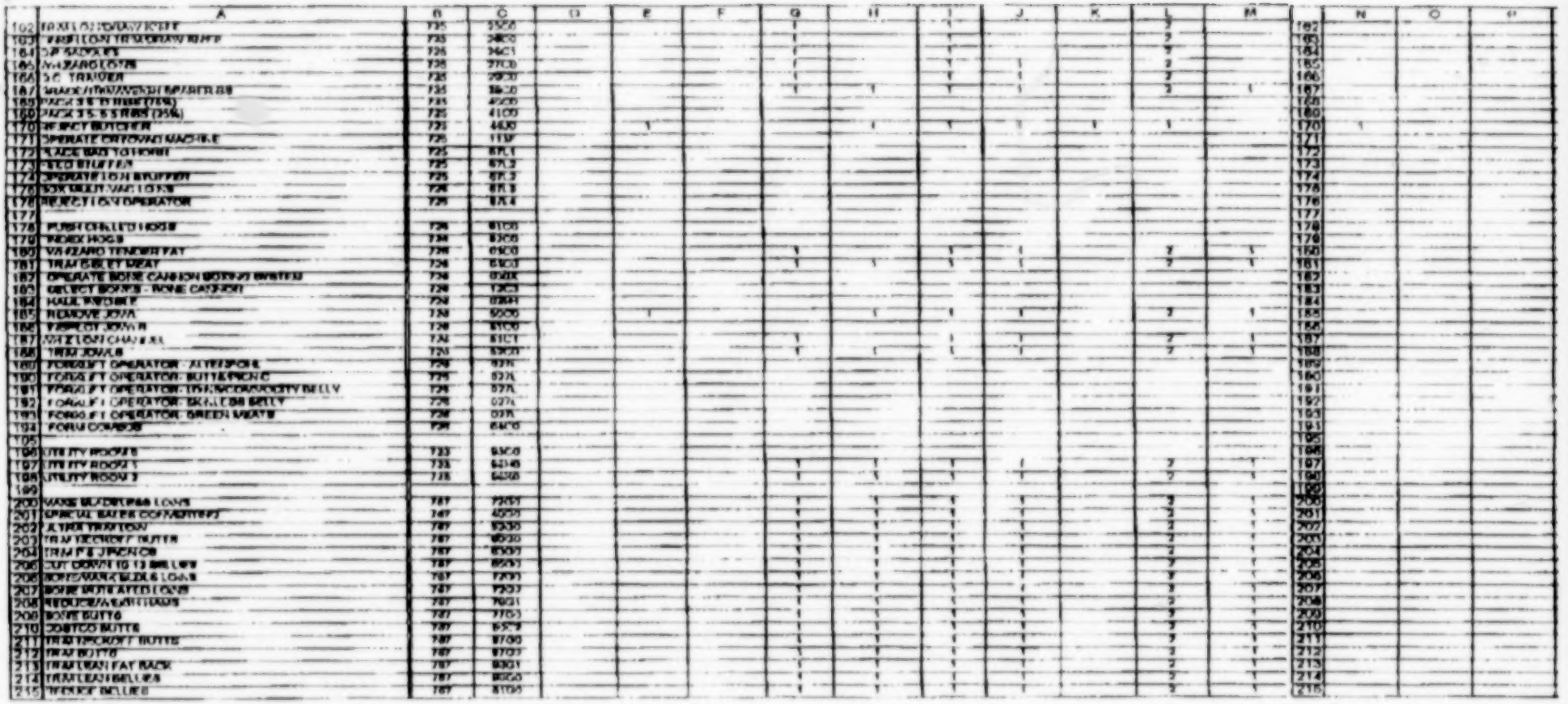
Please verify

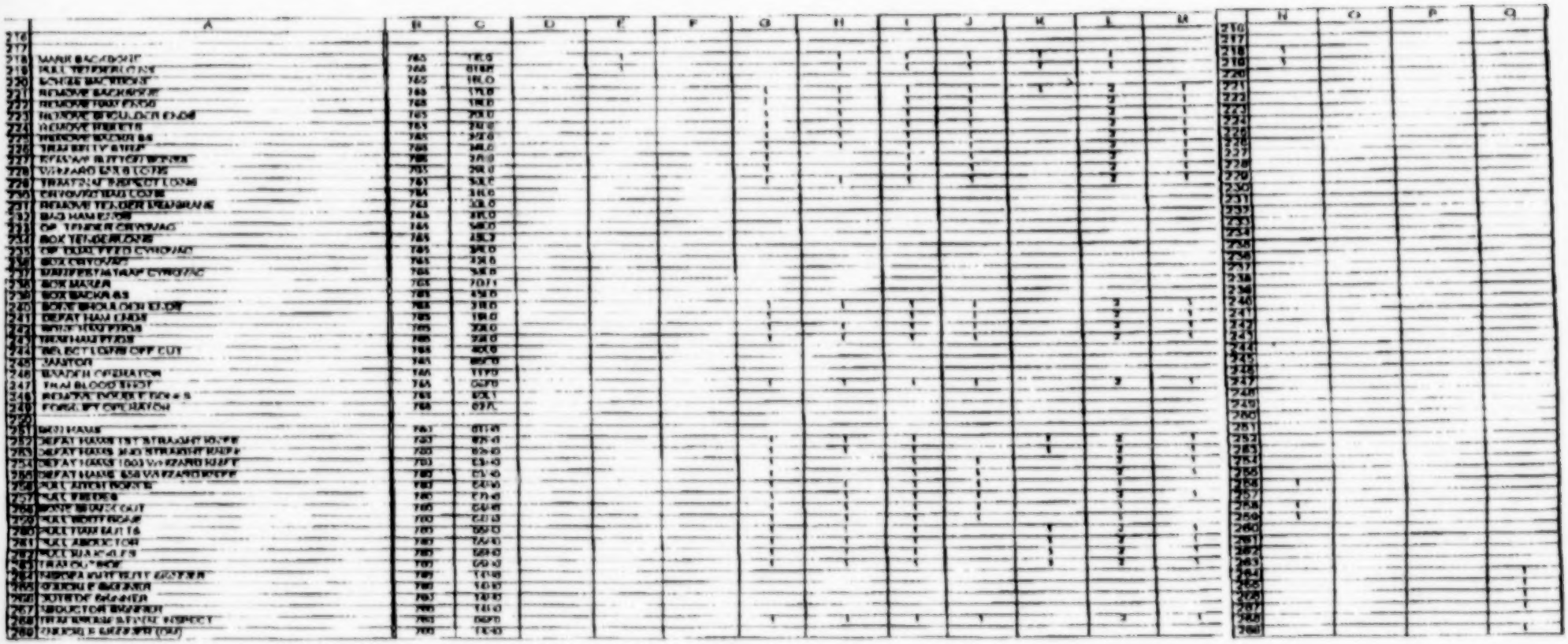


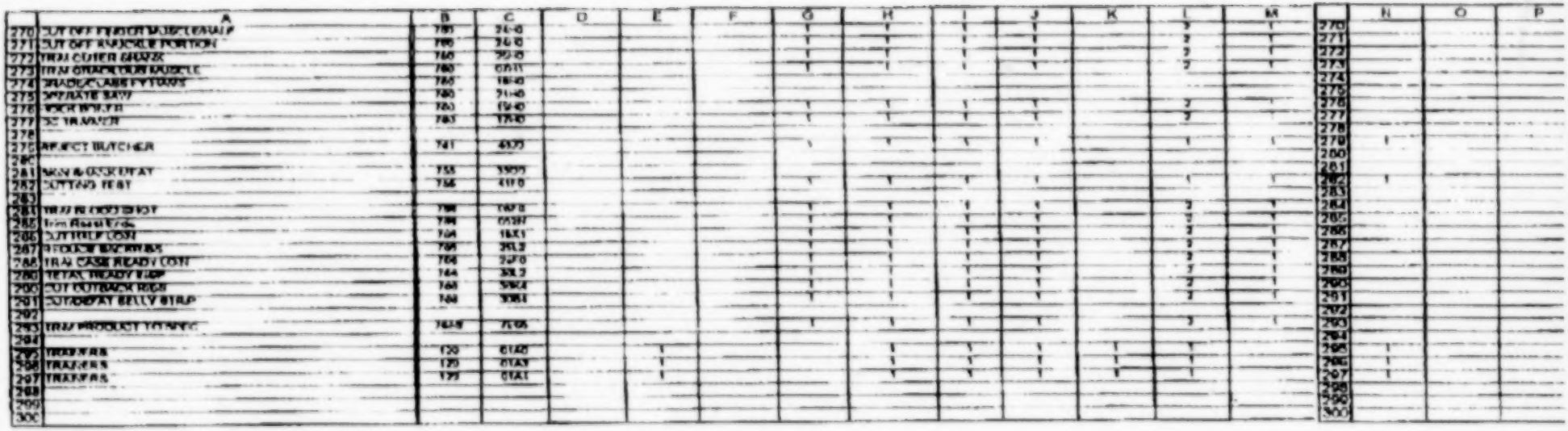
134











139

Estimate of Damages Due to the FLSA and Iowa Classes for Uncompensated Time Spent on Work-Related Activities Using Dr. Mericle's Conclusions of 18.00 Minutes for Fabrication Departments and 21.25 Minutes for Kill Departments for Donning, Doffing, Cleaning, and Walking

[Filed: 09/27/11]

Class	Number Awarded Damages	Damages
FLSA Class	440	$1,611,702.44
Iowa Class	2,850	$6,686,082.36

Notes. Damages were computed for Gang-Time Jobs only.

Damages were eliminated for individuals whose damages amount was less than $50.

Damages for the FLSA Class include damages for 11 additional individuals since it could not be determined which individual was the actual opt-in plaintiff.

140

Estimate of Damages Due to the FLSA and Iowa Classes for Uncompensated Walking Time Between March 31, 2004 and February 3, 2007 Using 2.92 Minutes for Fabrication Departments and 3.54 Minutes for Kill Departments

[Filed: 09/27/11]

Class	Number Awarded Damages	Damages
FLSA Class	352	$127,895.91
Iowa Class	1,686	$413,434.71

Notes. Damages were computed for those days between March 31, 2004 and February 3, 2007 where a Gang-Time job was worked.

Damages were eliminated for individuals whose damages amount was less than $50.

Damages for the FLSA Class include damages for 7 additional individuals since it could not be determined which individual was the actual opt-in plaintiff.

141

Estimate of Damages Due to the FLSA and Iowa Classes for Uncompensated Time Spent on Work-Related Activities Using 15.00 Minutes for Fabrication and Kill Departments for Donning, Doffing, Cleaning, and Walking

[Filed: 09/27/11]

Class	Number Awarded Damages	Damages
FLSA Class	438	$1,184,227.26
Iowa Class	2,740	$4,903,621.51

Notes. Damages were computed for Gang-Time Jobs only.

Damages were eliminated for individuals whose damages amount was less than $50.

Damages for the FLSA Class include damages for 9 additional individuals since it could not be determined which individual was the actual opt-in plaintiff.

Dr. Mericle's Observed Times Vary Widely

Fabrication (Cut and Retrim)

Activity	Sample Size	Shortest observed time (minutes)	Longest observed time (minutes)
Pre-shift: don equipment at locker	88	.583	10.333
Pre-shift: dip scabbard, wash hands	120	.010	.580
Pre-shift: don equipment in department	23	1.017	5.133
Pre-lunch: doff equipment	Less than one minute	.033	3.917
Post-lunch: don equipment		.450	5.650
Post-shift: doff, clean equipment in department	28	.300	3.567
Post-shift: inspect, disinfect at door	18	.033	.383
Post-shift: doff, store equipment at locker	21	1.783	9.267

1

Dr. Mericle's Observed Times Vary Widely

Kill

Activity	Sample Size	Shortest observed time (minutes)	Longest observed time (minutes)
Pre-shift: don equipment at locker	51	2.100	13.283
Pre-shift: don equipment in department	11	.917	4.550
Pre-lunch: doff equipment	Less than one minute	.417	2.683
Post-lunch: don equipment		.500	6.350
Post-shift: doff, clean equipment in department	52	.200	5.750
Post-shift: doff at locker	15	1.967	5.517

2

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Civil No. 5:07-cv-4009

PEG BOUAPHAKEO, et al, individually and on behalf of a class of others similarly situated,

Plaintiffs,

vs

TYSON FOODS, INC.,

Defendant.

TRANSCRIPT OF PROCEEDINGS

* * * *

[40] JOHN ANTHONY SEBBEN,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WIGGINS:

Q. Good afternoon, Mr. Sebben. Give us your full name.

A. John Anthony Sebben.

Q. You and I have not met before, have we?

A. Not that I recall.

Q. All right. By whom are you employed?

A. Tyson.

[41] Q. And where?

A. In Storm Lake.

Q. How long have you been at the Storm Lake plant?

A. I have been at Storm Lake since 1982.

Q. All right. And you're a manager?

A. Yes.

Q. And what are you a manager of?

A. Kill floor.

Q. And tell us what the kill floor is.

A. The kill floor is where they—they begin the processing of the hog, they slaughter—it is the slaughter process, they dehair the hog, eviscerate the hog, and prepare it for the processing.

Q. Have you worked anywhere since 1982 other than at the Storm Lake plant?

A. No.

Q. All right. Now, when did Tyson take over the Storm Lake plant or buy it?

A. I don't recall the year for sure.

Q. Give me your best estimate.

A. I believe—I believe it was '92 maybe.

Q. '92? Was it—wasn't it more like 2001 or 2?

A. I don't recall the date.

Q. Okay. Now, your job is called general supervisor?

A. Yes.

* * * *

[45] Q. Okay. Now, on the first floor in the—what is that called, that department?

A. There's a retrim department and a cut department.

Q. Is that—those two departments are normally known as processing?

A. Yes.

* * * *

[55] Q. All right. Now, you also have—we've also heard here today, you weren't in the room, but I am sure you know about it, that the company at some point paid four minutes for what is called donning and doffing time or K-code time. You are familiar with that, correct?

A. I am familiar with K-code and donning and doffing, but I don't deal with that directly at all.

Q. That's the point of my question. This tracking, this daily time report that is done for the gang time where you are trying to get it right to pay for the actual time, no one is doing that for the donning and doffing time, are they?

A. I don't understand the question.

Q. Well, there's no—there's no assistant supervisors, supervisors or managers who are checking the time spent on donning, doffing, washing, or sanitizing the company equipment before gang time begins?

A. We don't police that.

Q. Right. Okay. You just—someone else in the company just pays a flat time no matter how much time it takes?

A. I don't know that. I don't deal with that, sir.

Q. At least no one in the—on the production team that works with the employees out on the floor is keeping up with the [56] actual time spent on donning, doffing, or washing or sanitizing the company equipment, are they?

A. No, we don't.

* * * *

Q. All right. Let's look at slide four. Maybe I didn't put it right. This is an agreement—I want to see if you agree with it for your department. This is Stipulated Fact No. 17. It says, "Employees are required to stow such knife-related items as equipment in their lockers at the end of their shift except for items that require or need laundering or items that require or need replacement." Is that true for your 200 some odd employees?

A. Yes, they place their equipment in their locker at the end of shift or in, their laundry bag for laundering.

* * * *

[57] Q. Okay. So I am—in the morning, the first thing that is required by Tyson of its employees is to go fetch the company equipment so they can transport it to the production line, correct?

A. That's—they're required to have their equipment when they go to their job site.

Q. Okay. Is 17, this is a stipulation—this is not—that is not it. Slide—what did I say, slide five, isn't it? That is not five. Here we go. For your 200 and some odd employees, is number 23 a correct statement when it says that, "Production employees go to their lockers at the start of their shift to obtain their individual supply bag in which Tyson has put their sanitary items

and equipment that requires laundering between shifts, such as the company-issued frock, cotton gloves, [58] Polar gloves, and Polar sleeves?"

A. Yes, that would be true, they need to retrieve those and carry them to their job station.

Q. Okay. And then number 24 is true for your employees also, that the knife-wielding employees go to their lockers at the start of their shift to get their knife-related items and equipment?

A. Yes.

* * * *

[64] Q. Okay. And the next item is—we covered steel, what did we not cover? Looks like we covered all the items on that. Now, let's go to slide—I keep losing this one. Let me look at it real quick. What is the one on the whites? Do you have one on the whites? Are your employees required to put on pants and a shirt issued by the company that are known as whites?

A. Yes, they are.

Q. Do you see those in front of you?

A. Yes, they are.

Q. All right. And kill employees under your supervision [65] are required to wear these pants and shirt?

A. Yes, they are.

* * * *

[67] Q. Okay. Now, are employees in your department required to keep their whites clean?

A. They are required to put them in their laundry bag at the end of shift.

MR. WIGGINS: Your Honor, may I publish—I offer Exhibits 328 and 337.

MS. BURKHARDT: No objection.

THE COURT: Received.

BY MR. WIGGINS:

Q. I have seen company policies that say if your whites get bloody or greasy or not really kept clean during the shift, they're required to be replaced and get another, correct?

A. If—that would be a case-by-case basis. If there is a situation that requires a person to change their clothing, it would be done on company time, it would be replaced and sent to change.

Q. Yes, but because that's while the gang time is going on, correct?

A. Yes, sir.

[68] Q. All right. But the—if the employee gets greasy or bloody or all these other items that come with handling the slaughter of animals and they're required to go change their whites, that's going to take time away from production, correct?

A. The manager in charge of that line will have to—to arrange his people so that he can still perform his tasks and still get the employee out to do that.

Q. That is something you like your employees to avoid is time away from the production line while it is running, if possible?

A. That is something that is a natural occurrence on the floor and we're trained to deal with it.

Q. But you also are trained to keep it to the extent possible to a minimum, correct?

A. When dealing with livestock like we do, there's—there's pathology involved that we have no control over. We accept that fact, we understand that fact, and we—we deal with it in regard to helping people change their clothes.

Q. And the way employees normally keep their whites clean so they don't have to go change them all the time is to wear this plastic apron?

A. Yes, sir.

Q. And so that's something really necessary for the employee to be able to do their job effectively and efficiently, correct?

[69] A. It is necessary for them to—yes, we require them to wear aprons.

* * * *

[77] Q. And you—all right. Now, when the employee—we [78] established earlier that the employee must come in to the locker room to pick up all these items, put some on, carry others out to the production line, correct?

A. Yes.

* * * *

[79] Q. All right. I want to turn to one of the rules that that is referring to. Turn over to Rule 44 on page four of this Exhibit 153. That's not it. Exhibit 153. There you go. Number 44. You cut off a few words. I will try to add them in. Rule 44 says, "While team members are putting on their equipment, they should leave the rest of their PPE hanging in their lockers and put them on directly from there. Do not lay them on the bench or floor." Now, that is what you expect of your employees, correct?

A. Yes.

Q. That's important to prevent adulteration or contamination of the meat by contaminating the sanitary items themselves, correct?

A. Yes, I wouldn't consider the bench sanitary.

Q. When it says PPE, "Should leave the rest of their PPE hanging in their lockers." What is a PPE?

A. Personal protective equipment.

* * * *

[83] Q. Okay. And the reason they're transporting these various items from where they store it—where you require them to store them at night over to the line is because you want them to sanitize them on the way to the line, correct?

A. Yes, we do require that.

* * * *

[89] Q. But you admit that the company policy in writing to the employees is they must wash their hands thoroughly with an [90] approved hand washing and sanitizing compound in an adequate hand washing facility before starting to work, correct?

A. Yes.

Q. They are required to do all that after each break, correct?

A. Yes.

Q. And they are required to do it anytime they left the production area and are coming back, correct?

A. Yes.

Q. And that's because you are trying to protect against adulteration of the meat you are selling your customers, correct?

A. Yes.

Q. You don't want employees going into the restroom, going outside, or doing anything outside the production area without thoroughly washing and sanitizing their hands with an approved compound, do you?

A. No.

Q. But that is done off of gang time, correct?

A. Well, it would—depending upon when they went. I mean, people going to the restroom during the course of the day would be on gang time, would be an example of being on gang time.

Q. But it says up here that you must do these things, the words say, "Before starting to work." Isn't that referring to [91] before gang time?

A. I can't answer that for sure.

Q. Okay. Well, what work do they perform before gang time in your opinion?

A. Well, it says wash hands before returning to work. That to me is—would indicate they've left the job for a number of reasons and they're required to wash before they go back to the job. An example again would be if they went to the bathroom.

Q. Okay. I am going to get to the things during the day in a minute, but right now I am on this sentence, the part that says, "Before starting to work." Isn't that the morning?

A. Okay. Before starting work.

Q. That's before gang time starts, correct?

A. Yes.

Q. So that's on unpaid time, correct?

A. Yes.

* * * *

[92] Q. And like at the end of the day he is required to carry his company equipment and take it off, hang it up before he is allowed to leave the production area and go to the cafeteria or the bathroom or outside, right?

A. Yes, that's true.

* * * *

[94] Q. Now, employees are required to be on the line fully dressed ready to work the very second that gang time begins, correct?

A. Yes, when a product gets to their work station.

Q. So that. means in the morning they are also doing all these activities we talked about, they're picking up, they're transporting, sanitizing, the donning, before they get to the [95] gang time start time, correct?

A. Yes.

Q. So that's all on unpaid time?

A. Yes.

Q. Let's talk a little bit about the end of the day. At the end of the day the same is true, as we showed—as you told us about at the break, that is they're paid only to the minute they step off the line or the second they step off the line, correct?

A. That's my understanding.

Q. Okay. And at that point your kill employees have to take their knives, their scabbards, and these various things we have seen that they are cutting the meat with and working with, they can't leave them on the line, can they?

A. No.

Q. The company wants them to transport that for them, for the company, correct?

A. Yes, they're responsible for their equipment.

Q. The company wants the employee on unpaid time to transport these knives and these scabbards and all these items over and sanitize and scrub them away from the production line, correct?

A. Yes.

* * * *

[97] Q. And you would agree that the company requires its employees to get all the blood and the grease and the viscera from the—from the workday off of them?

A. Yes.

Q. At the end of the shift before they go to the locker room, correct?

A. Yes, they get the majority of it off and then they launder many of the items that they work with during the day.

Q. And the company prohibits employees from putting dirty [98] frocks or whites or anything in the locker, correct?

A. Yes, we discourage that.

Q. And it requires the employees instead to take those laundry items and put them in a laundry bag at the end of the shift, right?

A. If there's—yes.

Q. And that's a bag with a PIN number or their locker number?

A. Yes.

Q. And they put all the items like the whites and the various cloth items, what you call the Kevlar, Polar glove, sleeve, you didn't say the rubber gloves, all those type of items, they go into the bag, the bag is—it is a mesh bag, right?

A. Yes.

Q. And then it goes to the laundry in the bag and is laundered while still in the bag, correct?

A. Yes.

Q. And then once it dries it comes back into the employee locker?

A. Yes.

Q. The employee comes in and all his stuff is down in the bag, it is sort of mixed up because it has been in the washing machine, right?

A. Yes.

[99] Q. The employee has to take it all out and straighten it out and get it ready to use for the next day when they get there in the morning, correct?

A. Yes, they retrieve it from their bag.

Q. Now, would you agree that preventing contamination of the meat is paramount to Tyson?

A. It is a very important part of our process, yes.

Q. Well, it is—it is the most important item in terms of being able to sell your meat that is unadulterated, correct?

A. Yes, sir.

* * * *

[141] Q. What do the team members have to wash at the end of their shift?

A. They are required to wash their hard hat, their knives and scabbard, their mesh glove, and to rinse their apron off.

Q. I want to show you a video, it is a video that the Plaintiffs' expert, Dr. Mericle, took while he was in the plant, this is a video that the Plaintiffs have provided to us.

MS. BURKHARDT: Conni, can you pull up the video and just before you play it, just let it—let us take a look at it? 87.

MR. WIGGINS: Exhibit 87?

MS. BURKHARDT: It is video clip sequence 87. Can you stop it for a moment?

Q. All right. Mr. Sebben, can you just take a look at what we have up on the screen before we play it and tell me if you can tell where this individual is.

A. This is on the kill floor. It is the wash area in the—more in the center of the kill floor.

Q. Can you tell whether this employee is a kill floor employee or a processing floor employee?

A. He's kill floor, he has whites on.

Q. All right.

MS. BURKHARDT: Connie, can you back it up so it starts at the beginning? Before you play it, I want to ask one [142] more question.

Q. Mr. Sebben, can you tell us what the time is in the bottom right-hand corner of the video?

A. 3:59:35.

Q. So can you tell from this—let's watch the video then I can ask you that question. I am going to have you watch the video. If you can just tell the jury what this employee is doing right here.

A. This employee is hosing off their boots, their scabbard with the knives in it, and giving their—their apron a quick rinse.

Q. Does he appear to be finished with all of his post-shift washing?

A. Based on the direction he's walking, he's leaving the floor.

Q. So does that indicate to you that he's finished with his washing?

A. That's what that would indicate to me.

Q. Can you tell me what time the—it shows on the video right now?

A. 3:59:45.

Q. And about how long based on the start time of the video did it take this individual to do this rinsing? If we need to play it again, we can do that for you.

A. I don't recall the start time.

[143] Q. Okay.

MS. BURKHARDT: Connie, do you want to start it again?

THE WITNESS: Okay. It was about 12 seconds.

BY MS. BURKHARDT:

Q. When this employee walked up to the washroom, was it crowded?

A. It does not appear to be.

Q. Did he have to wait to use the hoses in the washroom?

A. No.

Q. Is what we have seen here in this video a normal occurrence that you would see on the kill floor?

A. It can be, but obviously with the amount of hoses there, there are times when they're all filled, you know; but there's a good continuous flow through there.

Q. And the amount of time it took the employee to rinse off his equipment, is that a normal amount of time that you might see?

A. It can vary. That—that's a—that's pretty quick.

Q. Would this be—would it be unusual to see someone do it this quickly?

A. No, no, not at all.

MS. BURKHARDT: Your Honor, I want to move the video clip into evidence as Defendant's 2241.

MR. WIGGINS: No objection.

THE COURT: 2241 is received.

[144] BY MS. BURKHARDT:

Q. Mr. Sebben, I am going to show you another video clip.

MS. BURKHARDT: Connie, if you can pull up segment 49.

MR. WIGGINS: Your Honor, I think we're—we are using different exhibit numbers on these than what we can correlate to. Can we use the original exhibit numbers?

MR. MUELLER: That was the exhibit number. I am looking for the original exhibit number for this one.

THE COURT: You filed an amended exhibit list just before trial. Is that the one we are referring to right now?

MR. MUELLER: After the final pretrial conference we gave the Plaintiffs a list of what we were going to call some of these clips and gave them numbers just for convenience and I will find that for you, Mr. Wiggins.

MR. WIGGINS: I would appreciate it.

BY MS. BURKHARDT:

Q. Mr. Sebben, again, this is a video that Dr. Mericle, Plaintiffs' expert in this case, took when he was in our plant so it is a video that the Plaintiffs gave to us. Can you tell where we are in the plant?

A. This would be the second wash station on the kill floor.

Q. I am going to direct your attention to the employee in the back right-hand corner, this woman right here. (Indicating) If you can look up behind you and see what I am pointing to, [145] this woman back here. (Indicating) Okay?

A. Yes.

Q. Can you tell what department she works in?

A. That would be a kill floor person based on their whites that they're wearing.

Q. What time does the video show in the bottom right-hand corner?

A. 10:06:01 p.m.

Q. From—based on that time can you tell whether this is an A shift or a B shift employee?

A. 10:06 p.m. would be B shift employee.

Q. As you watch the video, I am going to ask you to tell the jury what the employee is doing and if you can also note the time that we are starting, I am going to ask you how long it took her to do those activities.

MS. BURKHARDT: Connie, if you want to play that video.

Q. What is the employee doing right now?

A. Well, she's putting on a nylon glove right now.

Q. And what is she doing now?

A. And putting on a rubber glove it appeared like.

Q. She is going to come back into our view here in a second. Now, what does it look like she's doing?

A. Now she's putting on a mesh glove.

Q. Does it appear crowded to you in the washroom?

[146] A. No, it doesn't. She has her knife sharpening implement with her.

Q. In her hand?

A. Yes.

Q. And what was the last item she picked up?

A. Her apron.

Q. In your experience do some employees carry their knife equipment and their aprons out of the washroom?

A. Yes.

Q. And they would don those on the way to the work station?

A. Some do, yes.

Q. And if you could—

MS. BURKHARDT: Why don't you start that from the beginning again, Connie.

Q. Take a look at the start time for this video. Go ahead. You can play it. Mr. Sebben, what is the end time we have there on the video?

A. 10:06:32.

Q. So about how long did it take her to put on all of her gloves, grab her knife equipment and her apron and head out to the floor?

A. It appears like 31 seconds.

Q. Is this a normal sequence or occurrence that you might see on the kill floor?

[147] A. It would appear that way to me, yes.

Q. Is the amount of time it took this woman to do these activities a normal amount of time it might take somebody?

A. Yes, they become very efficient at putting on their equipment.

* * * *

[150] Q. Mr. Sebben, you are looking at Plaintiffs' Exhibit 301 which is an equipment list for the Storm Lake plant. I just want you to walk the jury through this document. Can you tell us first of all what the list of items in the right-hand column under the title Position are?

A. That would be equipment worn by the employees when they do their job.

Q. And do you see the column titled Position?

A. Yes.

Q. You can pull that microphone in front of you if that's easier. You can kind of adjust it so you don't have to keep reaching over if you want to pull your—there you go. The column next to the position column where it says D-E-P-T, what does that represent?

A. The department they work in.

Q. And the next column under Work Code, what does that represent?

A. That would be the work code for the job.

Q. Is that also sometimes referred to as a job code?

A. Yes.

Q. And the row across the top there that starts with two shin guards, what are those items?

A. Those are items that—protective equipment items.

[151] Q. And can you just quickly read off for the jury what each column—what each protective equipment item is there?

A. Do you want me to read the top column?

Q. Yes, just the top rows.

A. Okay. Two shin guards, mesh apron, legging apron, belly guard, scabbard, steel, one mesh glove, one Polar glove, one Polar sleeve, glass arm guard, one mesh sleeve, mesh sleeve, knocker vest, and skinner gloves.

Q. Now, we looked at a number of those items, you identified them yesterday. Did we see a knocker vest yesterday?

A. I did not see a knocker vest.

Q. Is that an item that would be used at the Storm Lake plant?

A. No.

Q. What about shin guards, did we see shin guards yesterday?

A. No, we did not.

Q. Are you aware of any employees at the Storm Lake plant that use shin guards?

A. No, I'm not.

Q. All right. Did we see something called a legging apron yesterday?

A. No.

Q. And are you aware of any employees at the Storm Lake plant that use a legging apron?

[152] A. No, they don't.

Q. Okay. Looking at this document, can you tell the jury what the numbers in the columns represent?

A. The numbers in the columns to me would represent the—that they do indeed wear that piece of equipment and how many.

Q. Okay. So, for example, let's look at the position shave hams which is on line 16 of the document.

A. Okay.

Q. Do you see that?

A. Yes.

Q. What items does that position—what items does that position require to wear based on this document?

A. One scabbard, one steel, two Polar gloves, and one Plexiglass arm guard.

Q. That column says glass arm guard, is that really the Plexiglass arm guard we looked at?

A. Yes, it is.

Q. Okay. How do you know from looking at this document that those are the items that are required for the shave hams position?

A. Because they're designated as such in the box.

* * * *

[153] Q. Mr. Sebben, are you familiar with the jobs that are listed there in the Position column?

A. Yes, I am.

Q. Are those jobs that are on the kill floor?

A. Yes.

Q. And are you familiar with the equipment that is required for the jobs on the kill floor that you supervise?

A. I am familiar with most.

Q. Okay. And are you familiar with the shave hams position?

A. Yes.

Q. If you look—you indicated that the shave hams [154] position is required to wear the Plexiglass arm guards. Are there other positions on the kill floor that are not required to wear the Plexiglass arm guard?

A. Yes.

Q. And looking at—

MR. WIGGINS: Your Honor, I am going to object again. This is really sort of a massive leading question. He's being prompted to read down a document. It is not showing any personal knowledge.

THE COURT: He works on the kill floor. He supervises the kill floor. He would know presumably whether every position wears an arm guard or not. Overruled.

BY MS. BURKHARDT:

Q. Mr. Sebben, can you give us an example of some of the positions that are not required to wear a Plexiglass arm guard?

A. Janitor would be one, trolley room operator would be one, those are two that come to mind.

Q. Let's look at line 23 which is the janitor position which is one that you just mentioned. Are you familiar with the janitor position on the kill floor?

A. Yes, I am.

Q. Is that position different than the janitor position in the maintenance department?

A. Yes, it is.

Q. And what does a janitor on the kill floor do? What's [155] their job duties?

A. Janitor on the kill floor is in charge of housekeeping and general pickup of product that would be on the floor, trimmings on the floor, and some washdown.

Q. And if you would look at line 23 for the janitor position, what items are required for the janitor position on the kill floor?

A. Two Polar bear gloves.

Q. Is the janitor position on the kill floor required to wear any other safety items?

A. No.

Q. Are there items that the shave hams position wears that the janitor position is not required to wear?

A. Yes.

Q. What are some examples of that equipment that the shave hams position is required to wear, but the janitor is not?

A. Scabbard, steel, arm guard.

Q. And so does that—in your experience do some positions on the kill floor wear certain equipment and other positions wear different equipment?

A. Yes, they do.

Q. In your experience do the positions on the kill floor generally wear different equipment based on the job?

A. Yes.

Q. Let's look at one more position, let's look at line 86 [156] which is pipe chitterlings. Is pipe chitterlings a position on the kill floor that you supervise?

A. It is a position in the chitts department. It is part of the kill floor.

Q. You supervise the chitts department, right?

A. Pardon me?

Q. Do you supervise the chitts department?

A. Yes, I oversee that.

Q. What does the pipe chitterlings position do?

A. They—the chitterling is the intestine and they put it on a water nozzle, a water pipe and push it into a machine like this. (Indicating)

Q. Are you familiar with an employee who is a Plaintiff in this case named Leticia Montes?

A. Yes.

Q. Did Ms. Montes work in the pipe chitterlings position?

A. I believe she has.

Q. What safety equipment does the pipe chitterlings—what safety equipment is the pipe chitterlings position required to wear?

A. Nothing from a safety standpoint.

Q. So are there some positions on the kill floor that aren't required to wear any knife-related safety equipment?

A. Yes.

Q. Can employees choose to wear standard items and PPE [157] that are not required?

A. Yes.

Q. Do employees sometimes choose to wear items that are not required?

A. Yes, they do.

Q. Now, Mr. Wiggins showed you some items yesterday that he had you identify like the frock, the hair net, the whites, the mesh gloves, and some other items. Do you recall seeing those?

A. Yes.

Q. Can you tell me about how many jobs on the kill floor wear—are required to wear safety glasses?

A. It would be—this is somewhat of a guess here—30.

Q. And do you know about how many positions there are on the kill floor?

A. There are 135.

Q. So about 100 of those positions would not be required to wear safety glasses?

A. As well as I can recall, yes.

Q. You will recall Mr. Wiggins showed you that yellow plastic rain suit, the two pieces. Do you recall seeing that?

A. Yes.

Q. Are there any positions on the kill floor where that yellow plastic rain suit is required?

A. No.

[158] Q. And you also recall Mr. Wiggins showed you a plastic apron. Are there certain positions on the kill floor that are required to wear that plastic apron?

A. Yes.

Q. Do you know about what percentage of the jobs on the kill floor are required to wear the plastic apron?

A. I believe most would be required to wear the apron.

* * * *

[174] Q. Oh, 1:00 a.m. okay. All right. Now, in relationship to just taking that one person as an example, would you agree that the length of time it takes people to put things on and take them off varies from person to person?

A. Yes.

Q. Varies sometimes by how old they are or whether they've got arthritis or whether they're disabled or by various things?

A. It is more situational, for instance, if they feel they have some latitude on their time to get to the line or if they're—if they're hurrying a little more to get to the line.

Q. You said some people get efficient. Those are the longer-term employees?

A. I don't know how—I can't tell you how long it becomes to—you have to work to become efficient at putting on your equipment. There's certainly a learning curve.

Q. And you do agree that the time it takes is not a flat four minutes for every person, is it?

A. No, I already stated it varies.

* * * *

[176] WILLIAM EMORY SAGER II,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WIGGINS:

Q. Good morning, Mr. Sager.

A. Good morning.

Q. We have not met before, have we?

A. We have not.

Q. You were deposed by some other lawyers in this case under oath, correct?

A. I was.

Q. Okay. You heard the last witness, I had asked him about what your role in discipline is. Could you tell us?

A. Yes, essentially what happens is when a supervisor has determined that there was an infraction of some sort, that will [177] be documented on a daily absentee report which comes in to the personnel office daily. The clerks will then take that and they will type up the discipline, the discipline will then cross my desk, I will review it, initial it, and then I will send it off to the department.

Q. And your desk is in the personnel department. What is your job?

A. I'm the complex human resources manager.

Q. Okay. And so what you just described is a regular part of your official duties at the company, is that correct?

A. Yes, it is.

Q. What other duties do you have as the complex human resource director?

A. I oversee various departments to include the health services department, training department, security, as well as employment.

Q. All right. And in that job you have to be familiar with the company policies, correct?

A. I do.

Q. You couldn't really discipline somebody if you didn't know what the rules were, could you?

A. Correct. There are times I have to reference them; but yes.

Q. Okay. And you are familiar with the company policies on—for example, gang time, correct?

[178] A. Yes.

Q. And tell us what gang time is.

A. Gang time is the amount of time that production workers are performing their work. It starts when the first piece of product passes their work station and it ends when the last piece of product passes their work station.

Q. All right. And employees are required to be fully dressed with all this equipment we went over with Mr. Sager—Sebben and on the line ready to work at the moment that paid time begins, correct?

A. That's correct.

Q. That's a company requirement, correct?

A. Correct.

Q. And they can be disciplined if they're not fully dressed, fully scrubbed, sanitized, these various activities we've heard about, on the line, ready to work the moment paid time begins, correct?

A. Strictly speaking, yes.

Q. And before that gang time begins though, employees have had to do certain activities that the company requires them to do, correct?

A. Correct.

Q. And that is true for all production—all hourly employees in the production department, correct?

A. Correct.

* * * *

[181] Q. And by the same token then employees have done various activities that the company requires of them as a part of their job before they get to those punch clocks, correct?

A. That's correct.

Q. But even at the point in time in which they reach the punch clocks, are they going to have to perform some more activities after they punch for the company that the company requires before their gang time begins, correct?

[182] A. If that is in reference to dipping the equipment, then that is correct.

Q. And it is in reference to transporting and carrying equipment to the line too, correct?

A. That is correct.

Q. Part of the transporting of this company equipment from where you require them to store it in the locker room to the line, a part of it is before the punch clock, a part of it is after the punch clock, but none of it is on gang time, correct?

A. That is correct.

Q. And that's true for all production employees, all 1,300 of them?

A. I believe so, yes.

Q. Now, you said you have 1,300, but that's—that's at any one point in time, correct?

A. It's 1,300 approximately total for both shifts.

Q. But that is on a particular day, correct?

A. Yes.

Q. Okay. And you have a policy that employees are required to follow that they cannot punch in more than seven minutes before their gang time begins, correct?

A. That is not correct. It is actually a guideline.

Q. Well, it is something that the employees are trained on, correct?

[183] A. They are.

Q. And it is something the employees are expected to follow, correct?

A. Correct.

* * * *

[184] Q. And that's the purpose of the seven-minute rule as I understand it from your testimony in your deposition is to spot those situations where an employee might actually be doing work before gang time so you can get them paid, get them their actual hours paid?

[185] A. Yes, that's correct.

Q. And that's because on gang time you are very scrupulous in checking every day to make sure to see that the actual hours spent are paid for, correct?

A. Yes.

Q. For example, if someone comes in late, let's say they come in late by a minute, they are supposed to be there at 6:00, they clock in at 6:01, the supervisor is supposed to check that out too, correct?

A. Yes.

Q. And the supervisor—if he is not happy with the excuse, he can dock that one minute from the pay?

A. That's correct.

Q. By the same token if the—if the employee leaves early in the afternoon, the supervisors are responsible for checking that and making a decision as to whether the person should be paid or not paid till the end of the gang time, correct?

A. That is correct.

Q. And if the employee worked past gang time, the supervisors are responsible every day to make sure that you track the actual time spent beyond gang time that somebody might be doing something for the company, correct?

A. Yes, that is correct.

* * * *

[186] Q. So we know then that the company has a time system in place where it is administratively practical to keep up with the employees' time down to the minute, correct?

MS. PASCHAL: Objection. Foundation, and it is a legal issue that is going to be before the jury.

THE COURT: Wait just a minute.

[187] THE COURT: Overruled. Answer the question. Do you remember it?

THE WITNESS: No, Your Honor. Could you repeat, please?

THE COURT: So we know then that the company has a time system in place where it is administratively practical to keep up with the employees' time down to the minute, correct?

THE WITNESS: Yes, that is correct.

BY MR. WIGGINS:

Q. As a matter of fact, you keep it down to the one hundredths of a minute, correct?

A. That I'm not sure of.

Q. Okay. But you don't do that for these activities before gang time begins, do you?

A. No.

Q. There's no one at Tyson's plant in Storm Lake who is trying to keep up with the actual time the employees are spending on these activities before gang time begins, correct?

A. That is correct.

Q. And there's no one at Tyson Storm Lake plant who is paying any attention to how much the actual time employees are spending performing activities for the company after gang time ends, is there?

A. No.

Q. And by the same token there is no one at the Tyson's [188] Storm Lake plant who is trying to keep up the actual time employees are doing these activities

for the company when they step off the line at the break and until they get back from the break, is there?

A. No, there is not.

* * * *

[191] Q. Tyson has made a determination that these mesh items are compensable and they pay for them or they claim to pay for them, correct?

MS. PASCHAL: Objection. Foundation.

THE COURT: Overruled. Answer the question, if you can.

THE WITNESS: Yes.

BY MR. WIGGINS:

Q. But this—this pay that goes for the mesh items does not include the white pants or the white shirt, does it?

A. It does not.

Q. It does not include the boots, does it?

A. It does not.

Q. Does not include the hard hat, the eyeglasses, the hair net, the beard net, the plastic apron, the rubber gloves, the Polar gloves, doesn't include any of those items, does it?

A. I would agree with you except for the Polar gloves which I do believe are part of the additional protective equipment.

[192] Q. You are right. If I said Polar, I was mistaken. Anything else that is not included in what you are claiming to pay employees for these activities?

A. I believe that's all correct.

Q. And Tyson does not pay for any activities whatsoever at the break time, does it?

A. No, it does not.

Q. And that includes the items that you admit are compensable, the mesh items and all those things we've seen? Let's put slide 10 up just to get focused. Do you remember this from yesterday where it says, "The parties agree that donning, doffing, and rinsing the following items is compensable." It lists mesh apron, belly guard, steel, scabbard, mesh glove, Polar gloves, Polar sleeve, Plexiglass arm guard, mesh sleeve, and membrane skinner gloves. My question is this: You don't pay anything for doing those things at the break, do you?

A. No, we do not.

Q. Now, this—some of this equipment we have seen, this mesh equipment, the way it is made it can get meat in it and blood and grease and things like that in it when you are working, right?

A. Yes.

Q. This vest, for example, is that right?

A. Yes.

Q. But to protect—and that can cause bacteria and [193] microorganisms and other things that can contaminate the meat?

MS. PASCHAL: Objection. Foundation.

THE COURT: Do you know the answer to that question?

THE WITNESS: Yes, Your Honor.

THE COURT: Answer the question.

THE WITNESS: Yes, it's possible.

BY MR. WIGGINS:

Q. All right. But the—but the frock protects against that, correct?

A. Yes.

Q. Because if you wear the frock, it can't get in those webs in that mesh, correct?

A. Correct.

Q. And, in fact, you have testified in your deposition that the frock—that the frock is overtop the mesh items, correct?

A. Yes.

* * * *

[201] Q. And employees by and large normally, once they go to the locker room to get their equipment, they do proceed directly to the punch clock and then upstairs to the kill department or over to the processing department directly from the locker room, don't they?

[202] A. As a general rule, yes.

Q. And once the employee punches the clock they go on directly to the production floor, correct?

A. As a general rule, yes.

Q. Because the punch clock is right outside the production door, isn't it?

A. Yes.

Q. At the end of the day when the employee gang time ends, for which the time that he's being paid for on gang time ends the minute he steps off the line, correct?

A. Yes, that's correct.

Q. They are not allowed to leave their equipment, their knives and that type of thing, on the production line, are they?

A. No, they're not.

Q. The company requires them to take all of their equipment, including their knives, their saws, and things that you store in their locker, take them away from the production line and to begin to wash and sanitize certain of them, correct?

A. The washing part is correct, yes.

Q. What is it that the company requires to be washed or sanitized at the end of the shift after they stop being paid on gang time?

MS. PASCHAL: Objection. Foundation.

THE COURT: Do you know the answer to that question?

THE WITNESS: As a general rule, yes, Your Honor.

[203] THE COURT: Answer the question.

THE WITNESS: Basically anything that has come in contact with product, knives, belly guard, hard hat, boots, to be actually washed and then if it's clothing equipment, that will be thrown straight into the laundry bag and then laundered.

BY MR. WIGGINS:

Q. All right. Tell us what that—what are the things that go in the bag?

A. It would be the frock, the whites, Kevlar sleeves, Kevlar gloves, rubber gloves, mesh sleeves, apron, plastic sleeves.

Q. Plastic sleeves go in the bag?

A. Yes.

Q. And the bag is in the locker room, correct?

A. Yes.

Q. It is in each person's locker, correct?

A. Correct.

Q. It has a pin on it that has a number for that locker, correct?

A. Yes.

Q. All the items are put in this mesh bag, isn't it? It is a mesh bag of some kind?

A. It is.

Q. All right. All items that you've named are put in the mesh bag and it is pinned by the employee, correct?

[204] A. Yes, that's correct.

Q. And they are not free to leave the plant until they've pinned that bag, are they?

A. I would agree with that.

Q. And all that time from when they stepped off the line to the time they get all this done and pin that bag, when they're free to go, they're not being paid for that, are they?

A. No.

* * * *

[207] Q. Now, Tyson has a rule against employees putting anything that's got blood or dirt or things on it in the locker, correct?

A. In the locker itself?

Q. Yes.

A. Yes.

Q. Okay. Tyson requires the employees not to put their frocks, whites, these other items that go in the bag in the locker because they could build up microorganisms and bacteria and that thing overnight and the next morning contaminate the meat, correct?

A. Yes, that's correct.

Q. And that's why you are paying these laundry room employees to do all that laundry while the employee has gone home after he's pinned the bag, correct?

A. Yes.

* * * *

[208] Q. Employees at the Storm Lake plant average about 48 hours a week?

A. Between 40 and 48 depending on the season.

Q. But for the year the average is 48, that was your testimony in your deposition, correct?

A. During that time, yes, that's correct.

Q. That was 2009 I think, is that correct, your deposition?

A. I believe so, yes.

Q. Has that changed?

A. The amount of hours worked as an average is totally [209] dependent upon the market and scheduling.

Q. At the time of your deposition, let's get the date—

MS. PASCHAL: Objection, Your Honor. I don't believe this is proper impeachment.

MR. WIGGINS: I am not trying to impeach, I am trying to get a date, Your Honor.

THE COURT: Yeah. But his deposition isn't relevant outside of impeachment. The objection is sustained.

BY MR. WIGGINS:

Q. At the time of your deposition you testified that the employees averaged 48 hours a week and you couldn't recall any weeks that they worked just 40, didn't you?

MS. PASCHAL: Same objection, Your Honor.

THE COURT: Sustained. Just ask him the question. In 2009 what were they doing? But reference to the deposition in the absence of an attempted impeachment is improper.

MR. WIGGINS: All right.

Q. You said at the time of your deposition the average was 48 hours, correct?

A. If that's what is in the deposition, then yes, it would have been correct.

* * * *

[219] Q. Now, let's go to the definition there of 3.3. It defines outer garment and aprons, frocks, smocks, plastic sleeves, gloves, and other outer clothing worn by team members who handle product. Outer garment is typically company-issued clothing that covers a team member's personal clothes, correct?

A. Yes.

Q. All right. Now, and it says—let's go to Section 1.0 of the document, do you see there where it says Policy Purpose and the purpose of the policy is, quote, "To define personal hygiene practices intended to prevent product contamination," correct?

A. Yes.

Q. And you agree with that, correct?

A. Yes, I agree.

Q. Let's then look at Rule 5.2.2 on outer garments on page two of Exhibit 232. That says, using the term outer garments, it says this: "Outer garments will not be allowed in break rooms, restrooms, maintenance shops, or any other area outside the immediate production area except for cleaning and storage of the smocks," correct?

A. Yes, that's correct.

[220] Q. That's Tyson's policy at the Storm Lake plant, correct?

A. Yes.

Q. And the break room, is that another word for the cafeteria?

A. Yes, they're synonymous.

Q. So outer garments are prohibited from being worn in the cafeteria by Tyson, correct?

A. During break times, yes.

Q. Okay. And outer garments as we saw the definition are prohibited from going into the restrooms, correct?

A. Yes.

Q. And outer garments are prohibited from going outside the plant, correct?

A. Correct.

Q. So employees are not allowed to take them home, are they, because that would be outside the plant?

A. There may be instances where they would take them home and launder them.

Q. Well—

A. Rare, very rare, but it is possible.

Q. The policy is that employees are not to take their outer garments outside the plant, correct?

A. Correct.

Q. So if an employee were to come into the plant and want [221] to go from the plant over to the administration building, pass through security, they would be prohibited from doing that with their outer garments on, correct?

A. Yes.

Q. And let's look at Rule 5.2.6 right below the one we are looking at there of this same policy. That section of the policy says, "All persons working in contact with product, food contact surfaces, and product packaging materials must adhere to hygienic practices while on duty to prevent adulteration of product and the creation of unsanitary conditions," correct?

A. Correct.

Q. And that is the requirement that Tyson expects its production employees to comply with, right?

A. Yes, that's correct.

Q. And then the next section, 5.2.6, it gets a little bit more detailed about the same subject. It says, "Aprons, frocks, and other outer clothing worn by team members who handle product must be of material that is disposable or washable. Clean garments must be worn at the start of each working day and garments must be changed during the day as often as necessary to prevent adulteration of product and the creation of unsanitary conditions," correct?

A. Correct.

Q. And that is the requirement that Tyson expects its production employees to comply with, correct?

[222] A. Correct.

Q. And that's why Tyson issues them these plastic aprons to wear over their whites or their smock so they don't get a buildup of blood or microorganisms or grease or other things that come from the animal that might contaminate the meat, right?

MS. PASCHAL: Objection. Foundation.

THE COURT: Do you know the answer to that?

THE WITNESS: I believe that is correct.

* * * *

[229] Q. When the company goes to the trouble to buy certain pieces of equipment, to furnish it to the employees, to wash it or to give them the means to wash it themselves, it is because the company considers that this is an item that an employee might need to actually perform their job, correct?

A. Yes, that's correct.

* * * *

[236] Q. In early 2010 what was the starting hourly wage at the Storm Lake plant?

A. It was $11 an hour.

Q. And what was the overall range for hourly production [237] workers at that time?

A. At that time it would range anywhere from the $11 an hour start rate to a top rate of $15.80.

Q. How often does the plant review wage rates?

A. Wage reviews are conducted annually, normally right around the 1st of July.

Q. As a result of these wage reviews are rates usually adjusted?

A. Yes, they are.

Q. How so?

A. Every time that I've been there they've been adjusted up. The last two years in particular they've gone up 30 cents an hour each year.

Q. We've heard already about K-code time and that the K-code time is four minutes. Can you explain for us in general terms what the K-code time is designed to pay employees for?

A. Primarily the K-code is designed to pay our team members who are wearing more specialized protective equipment, in other words, equipment other than just the frock, the hard hat, the hair net, the earplugs, to compensate them for the donning and doffing of that equipment.

Q. So some of the mesh items that we have looked at and the Polar sleeves, are those items that are included in the K-code?

A. Yes, they are.

[238] Q. And is the washing of those items post-shift included in the K-code?

A. Yes.

Q. From June 2004—excuse me, from 2004 until June 2010 has the K-code ever been more than four minutes?

A. Yes, back in 2007 the K-code was modified to range anywhere from four to eight minutes depending on the job.

Q. Do you know when the K-code—actually let me back up for a moment. We're calling it a K-code. Is that a cost code?

A. Yes, essentially, yes.

Q. Is that something that is itemized or broken out on an employee's pay stub?

A. Yes, it is.

Q. Do you know when the K-code is actually added to an employee's time?

A. Yes, it's added to their time at the end of the week.

Q. Is it ever paid at the overtime rate?

A. Yes, it is.

Q. And when might that occur?

A. Anytime an employee's hours exceed 40, any hours that are added on after that are paid at time and a half.

Q. So if an employee has worked 40 hours Monday through Friday doing production work on gang time, then on Saturday when the K-code is added, how much of that K-code will be paid at the overtime rate?

[239] A. All of it.

Q. Mr. Sager, I know you have sat through the opening statements yesterday and I want to ask you a few questions about some statements Mr. Wiggins made during his opening statements. Mr. Wiggins characterized the mesh apron that we looked at as chain mail. Do you agree with that characterization?

A. No, I—I could see how someone might see it that way, but no, this is not armor. This is protective equipment.

Q. How common is the mesh apron at the plant?

A. Not very. Typically—not in all cases, okay, but typically a pregnant woman who cannot get a belly guard on because of the pregnancy would wear, for example, the mesh apron and the reason the mesh apron is not worn so much now I think as in the past is due to ergonomic factors because it can be rather heavy whereas the belly guard is much lighter weight and provides the same function.

Q. Other than situations in which a woman might want a mesh apron during pregnancy, are there many positions that wear the mesh apron?

A. Not that I am aware of, no.

Q. If you wear a mesh apron, would you also wear the belly guard on top of it or underneath it?

A. Not to my knowledge, no.

Q. So are those in effect alternatives to each other?

A. Yes.

[240] Q. We also saw a single mesh sleeve. Do employees usually just wear one mesh sleeve?

A. Yes, I would say if a mesh sleeve is being worn, when they're being worn, it is normally just one sleeve and that is on the non-knife arm.

Q. How common is the mesh sleeve compared to, for example, the Kevlar or cloth sleeve that we looked at?

A. I would say the Kevlar sleeves are much more prevalent than the mesh.

Q. Are there any team members who wear both the mesh apron and a mesh sleeve?

A. Perhaps, but not that I can think of off the top of my head.

* * * *

[244] Q. I notice that this lists both earplugs and earmuffs. Are those alternatives?

A. In most cases, yes. The team member can choose to utilize either the earplugs or the earmuffs; however, if a team member has experienced a—what I would call a significant hearing loss, they may be required to wear both.

Q. But can a team member choose to wear the earmuffs if they have find it more comfortable than the earplugs?

A. Yes.

Q. And are there team members that do that?

A. Yes.

Q. Is that something that the plant accommodates—

A. Yes.

Q. —by making those items available?

A. Yes, they can choose either one.

* * * *

[253] Q. Mr. Sager, what does this picture show us?

A. This is the main truck entrance to the plant.

Q. So is this the Storm Lake plant?

A. Yes.

Q. And if we could now pull up 2232-1, are we now inside the plant?

[254] A. Yes, we are.

Q. Where are we in this photograph?

A. This is the cut floor on the processing side.

Q. Do you know this individual?

A. I do.

Q. Do you know what her job is?

A. Yes, she is a person that is applying dry ice to product.

Q. Can you tell us what she is wearing?

A. Yes, she has on her hard hat, hair net, safety glasses, earplugs, yellow cotton gloves, and a frock.

Q. Are those her own shoes that she is wearing?

A. Yes, they are.

Q. Are those shoes—can she wear those shoes to and from the plant?

A. Yes, she can.

Q. Is she wearing any sort of mesh item?

A. No, she is not.

Q. Is she wearing a rubber apron?

A. No, she is not.

Q. Is she wearing any sort of plastic sleeve?

A. No, she is not.

Q. Wearing any sort of Kevlar item?

A. No.

Q. Let's now go to 2232-6. Where are we now?

[255] A. We are still on the cut floor.

Q. Do you know this individual?

A. I do.

Q. And where is he working?

A. He is working as I say on the cut floor, he's what we call a Cryovac operator and what a Cryovac is is a piece of machinery that allows us to vacuum seal product.

Q. And when you say you know him, do you know him by name?

A. I do.

Q. What is his name?

A. His name is Mark Sevchek.

Q. What is he wearing?

A. Mark is wearing a hard hat, hair net, frock, and the green rubber gloves and earplugs.

Q. Those glasses that he is wearing, are those his own glasses?

A. It appears they are, yes.

Q. Is he wearing any sort of mesh?

A. No.

Q. Wearing any sort of Kevlar?

A. No.

Q. Is he wearing a plastic apron?

A. No.

Q. Is this appropriate for his job, what he is wearing?

[256] A. Yes.

Q. Let's now look at 2232-7. Where are we now?

A. We are still on the cut floor, processing.

Q. Do you know this individual?

A. Yes, he do.

Q. Who is this?

A. This is Mitch Turnbull.

Q. And what is Mr. Turnbull's job position?

A. On this particular day he was what we call a mule driver which is an electrically powered palletized jack.

Q. Is this sort of like a type of forklift?

A. It is. It is. It is a type of forklift.

Q. What is he wearing?

A. Mitch is wearing the hard hat, hair net, earplugs, beard net, he's got on a safety vest, frock, yellow cotton gloves, and the issue rubber boots.

Q. So when you say the issue rubber boots, are those the boots he has obtained from the plant?

A. Yes.

Q. Can he wear those to and from home?

A. He can.

Q. Is he wearing any sort of mesh?

A. No, he is not.

Q. Is he wearing any sort of plastic sleeve?

A. No, he's not.

[257] Q. Let's go to 2232-12. Where is this in the plant?

A. This is in the retrim area, again on the processing side.

Q. Do you know this man?

A. Yes, I do.

Q. Who is he?

A. His name is Greg Paulsen.

Q. What is Mr. Paulsen wearing?

A. Greg has on the hard hat and he—he's wearing a little bit different type of hair net, this is what we call a hoodie which I believe was addressed yesterday. He's also got on a frock, earplugs, and his yellow—I'm sorry, green rubber gloves.

Q. What is he doing? What does his job appear to be?

A. On this day he was doing what we call sorting trim.

Q. Is he wearing any sort of mesh?

A. No.

Q. Is he wearing a plastic apron?

A. No.

Q. Is he wearing plastic sleeves?

A. No.

Q. Let's go to 2232-14, please. Do you know who this lady is?

A. Yes, I do.

Q. Who is she?

[258] A. Her name is Barb McCann, similar to Mark Sevchek, she's also a Cryovac machine operator.

Q. And is this in the cut area of the plant?

A. It is.

Q. When you say the Cryovac machine, what is a Cryovac?

A. Again, as I mentioned just a few minutes ago, it is a machine that allows us to vacuum seal product. The product is actually packaged in the specified plastic bags that you can see in this picture and she lays them out on a—it almost looks kind of like a cutting board, but it is a plate which runs through the machine, a vacuum chamber comes down onto the plate and vacuum seals the product into the bag.

Q. What is she wearing?

A. Barb has on the hard hat, hair net, frock, and green rubber gloves.

Q. Does it look like she's wearing earplugs as well?

A. I'm sorry, yes, she is.

Q. And the hair net she is wearing, this is not the hoodie hair net, right?

A. No, no, this is just the regular hair net.

Q. What kind of shoes is she wearing?

A. She is wearing her own personally purchased shoes.

Q. And is that something she could have worn to work that day?

A. Yes.

[259] Q. Let's go to 2232-17, please. Where are we in the plant now?

A. We're back in the retrim area on the processing side.

Q. And what are these ladies doing?

A. It looks like they're bagging ribs.

Q. And are they basically doing the same job or doing the job together?

A. Yes.

Q. Can you tell us what the lady on the left-hand side is wearing?

A. Yes, she's got on her hard hat, hair net, in this case earmuffs, she's also wearing a frock, blue plastic sleeves, and green rubber gloves.

Q. What is the lady on the right wearing?

A. The lady on the right is wearing hard hat, looks like she's got the hoodie on, earplugs, apron, rain suit or at least the top half of it, the apron and the green rubber gloves.

Q. Is she also wearing company-issued boots?

A. She does have on the company-issued boots as well.

Q. Is that optional for her? Is that something she could choose to wear?

A. Yes, in this area she could choose to wear a leather boot of her own purchasing if she so desired.

Q. The—you noted that the woman on the right is wearing a rain suit top, but the woman on the left is not. Is [260] that okay for one of these women to be wearing one and the other not to be?

A. Yes, it is a matter of choice in this case. It is optional.

Q. So the woman on the right has chosen to wear a rain suit top?

A. Yes.

Q. But she is not wearing the plastic sleeves, the woman on the right?

A. No. Instead of wearing the plastic sleeves she has opted just to wear the rain suit top.

Q. That rain suit top, is that something that is for her benefit?

A. Yes.

Q. And how does it provide her benefit?

A. It keeps her dry, drier probably than just wearing the apron alone. It also provides a certain degree of warmth as well.

Q. Is it cold on the processing floor?

A. Yes, it is typically anywhere from I would say 39 to 42 degrees.

Q. Is employee comfort and convenience one of the reasons why Tyson provides items such as the rain suit and the plastic sleeves?

A. Yes.

[261] Q. I see here the woman on the left is wearing the earmuffs and they appear to be attached to her hard hat?

A. Yes, they are. Earmuffs are actually attached to the hard hat. There are two little grooves on the edge and the earmuffs just clip into that.

Q. Can you keep them attached to your hard hat if you are going to wear the earmuffs?

A. Yes.

Q. What about if you are wearing regular earplugs, can you attach those to your hard hat?

A. Yes, in fact, the common practice is if you are wearing the earplugs, the earplugs, I think you saw them yesterday, actually come on a string connecting the two and normally what they will do is loop them through the adjustable headband on the hard hat.

Q. Can they keep them looped through the head—the band on the hard hat between shifts?

A. Absolutely, yes.

Q. So it stays together as one item?

A. Right.

Q. And you referred to the woman on the right wearing a hoodie. I can see that she's wearing some sort of hooded sweatshirt, but are you also referring to the type of hair net she is wearing?

A. I was referring to the hair net, but you are right, [262] she is wearing a hooded sweatshirt as well.

Q. And I see that the woman on the right is—appears to be standing on a green stand. What is that?

A. We call them ergo stands, ergo short for ergonomics. With as many team members as we have, we have a lot of various heights so what these stands allow for is, let's say, a shorter person may not be able to work as effectively or as ergonomically without the

stand as they could with the stand which is going to provide them with a little more height which means ergonomically it is going to be easier for them to do the job.

Q. Is that something the company has provided for her in her position?

A. Yes.

Q. Let's go to 2232-18. What part of the floor are we on now?

A. We're on the kill floor now.

Q. Do you know who this lady is?

A. Yes, that's Blanca Marquez.

Q. Do you know what she is doing?

A. I believe she's trimming snouts.

Q. What is she wearing clothingwise?

A. She's wearing the hard hat, hair net, safety glasses, earplugs, green rubber gloves, a mesh glove, and a white nylon glove on the left hand.

[263] Q. When you say she is wearing a mesh glove, is she just wearing that on one hand?

A. Yes.

Q. What is the implement she is holding?

A. She is holding what is called a Wizard knife. To let you know what a Wizard knife is, it is a motor-driven knife, you can see the cable that leads to the actual knife itself and it turns a cable which in turn turns a round blade that spins very fast and that's—the name of the manufacturer is Wizard and that's why they're called a Wizard knife.

Q. The mesh glove that she is wearing, is that on the hand she is not holding the knife in?

A. That's correct, it is on the non-knife hand.

Q. And is that usual to just have one mesh glove on the non-knife hand?

A. Yes.

Q. Is she wearing the white uniform that we saw earlier?

A. No.

Q. Does she appear to be wearing her own clothing?

A. She is.

Q. What is the company's guideline about wearing your own clothing on kill?

A. It is tolerated as long as it meets the specifications.

Q. By specifications, what are you referring to?

[264] A. Clean, white, presentable.

Q. And I notice here her pants are actually tan. Is that okay in her instance?

A. It is. It's tolerated. We have since tightened down on that a little bit to where we want to make sure everybody is wearing white pants, although they could be purchased from a store or something like that.

Q. So an employee on kill can bring their own white shirt and pants and wear those on the floor?

A. Yes, they can.

Q. In fact, that's what this lady appears to be doing?

A. Yes.

Q. Is she wearing any sort of belly guard?

A. No.

Q. Is she wearing a mesh apron?

A. No.

Q. Is she wearing any sort of Kevlar sleeve?

A. No.

Q. Is she wearing a mesh sleeve?

A. No.

Q. Does she appear to be wearing any sort of Polar glove?

A. I'm sorry?

Q. Does she appear to be wearing any sort of Polar glove?

A. Not that I can tell, no.

Q. Let's go to 2232-19. Where are we now?

[265] A. We are again on the kill floor.

Q. Do you know what job this man is performing?

A. It appears that he is filling a stainless steel bucket which he is holding in his right hand with cheek meat which is meat off the head of the hog and they will take those buckets and dry ice them.

Q. What does he appear to be wearing?

A. He is wearing a hard hat, hair net, earplugs, frock, and green rubber gloves along with his white—I'm sorry, I mentioned frock. Not a frock, but the white uniform shirt.

Q. Is this the same white uniform shirt that we saw yesterday?

A. Yes.

Q. He happens to be wearing it over something.

Q. What is that that he appears to be wearing his white shirt over?

A. It appears to be one of his own personal long-sleeved T-shirts or something like that.

Q. Is that something he could have worn from home to the plant?

A. Yes, it's possible.

Q. Is it okay for him to be dressed like this?

A. Yes, it is.

Q. So in this instance did he have to change out of his top, the pink colored top that he is wearing to put on his white [266] shirt or did he just put his white shirt over it?

A. If he wore it into the plant, he could just put a shirt on right over it.

Q. Is this man wearing a rubber apron?

A. No.

Q. And he's on the kill floor I believe you said.

A. Yes, he is.

Q. Is that okay that he's—are there certain jobs on the kill floor where people choose not to wear aprons?

A. Yes.

Q. Is he an example of one?

A. He is.

Q. Does he appear to be wearing any sort of mesh apron or mesh sleeve?

A. No.

Q. Is he wearing any sort of Kevlar sleeve?

A. No.

Q. And is he wearing the hoodie hair net or regular hair net?

A. He's wearing the regular hair net.

Q. Let's go to 2232-21. Where are we now?

A. We're still up on the kill floor.

Q. And what are the two men in the foreground doing?

A. The name of the job is chisel head. Those are to be—quite honest those are hog heads on a spike and as they go [267] around they use that implement in their hand known as a chisel to pry meat and product off the head.

Q. The two men in the foreground, are they wearing gloves on the hands that they are holding their chisels in?

A. No, they are not.

Q. Is that okay on the kill floor?

A. Yes.

Q. And what are they wearing on their other hand?

A. On their other hand they both have on green rubber gloves and one for sure, the one on the right is wearing a white nylon glove.

Q. Why might he have put the white nylon glove over the green rubber glove?

A. Just to help grip the product, convenience.

Q. Is that something that is his choice?

A. Yes.

Q. Now, do you see the individual on the left in the background, he's holding his chisel with a yellow glove on. Is that the cotton glove?

A. It is.

Q. Is it okay that he has chosen to wear a cotton glove on the hand he is holding his chisel in, but the two members in the foreground have not chosen to wear that glove?

A. Yes, it is just personal preference. Sometimes they feel they can get a better grip on the chisel by wearing one of [268] those gloves.

Q. So is the cotton glove required for the chiseler on that hand?

A. No.

Q. The two men in the foreground, are they wearing belly guards?

A. Yes, they are.

Q. If you could point to us where the belly guard is just to show it.

A. It's right here (Indicating) with the strap coming around the back.

Q. Are they wearing any sort of mesh apron?

A. No.

Q. Are they wearing any sort of mesh sleeve?

A. No.

Q. Are they wearing any sort of Kevlar sleeves?

A. No.

Q. Are they wearing plastic aprons?

A. They are not.

Q. And, in fact, the man with the cotton glove in the back that we were talking about earlier, is he wearing a plastic apron?

A. No, he is not.

Q. Is that okay on the kill floor to choose not to wear a plastic apron?

[269] A. It is.

Q. Why can an employee choose to wear a plastic apron if they want to on the kill floor?

A. Just out of convenience, you know, it is going to help keep product off their clothes I mean to be quite honest. With the amount of blood and fluids and liquids up there, it's just going to help keep them drier and less messy.

Q. And is that their choice if they want to wear one?

A. Yes.

Q. I see some individuals in the background who are wearing yellow boots. Do you see that?

A. Yes.

Q. Are those company issued?

A. These may have been and the reason I say that is periodically we will test different types of boots, you know, to see if maybe there's a better one out there and those may have been test boots.

Q. Are those something employees could have worn to and from the plant?

A. Yes.

Q. And just to confirm, I see there's some meat down there in the bottom that is there on the floor. Where does that meat go?

A. What happens is the—any floor product is scooped up by the floor janitor and then it is sent off to rendering to be [270] rendered for various products such as pet food, et cetera.

Q. Is that inedible rendering?

A. It is inedible, yes.

Q. So it doesn't actually go to a human consumer?

A. No, it does not, unless they are feeding it to their dog.

Q. Let's go to 2232-35. Do you know who this lady is?

A. I do. Her name is Teresa Anthony. She works on B cut.

Q. What is she wearing?

A. Teresa has got on her hard hat, she's got on one of the hoodies, she's got her earplugs in, she's wearing a frock, apron, and green rubber gloves.

Q. And what is that that she seems to have attached to her apron?

A. That is a watch clipped—is clipped to her hoodie.

Q. Is she allowed to have a watch clipped to her clothing?

A. Yes.

Q. What can she use that for?

A. Team members typically like to know what time it is, how soon they're, you know, how soon it is to break time or how soon it is before quitting time. They will usually synchronize it with the time clocks so they know exactly when they have to be back from break.

[271] Q. Okay. Let's go to 2232-41.

MS. PASCHAL: Connie, is there any way to clear that mark where we have marked on the photo or is that something we have to do it from the screen?

THE WITNESS: There we go. Got it.

BY MS. PASCHAL:

Q. Thank you, Mr. Sager. Do you know where we are now in the plant?

A. Yes, this is back in the retrim department.

Q. I see the word Cryovac. Are we at the Cryovac machine?

A. Yes, this is another one, yes. You can actually see the vacuum chambers I was talking about earlier.

Q. The man in the foreground, what is he wearing?

A. He's got on his hard hat, hair net, beard net, earplugs, frock, and green rubber gloves.

Q. What about the man behind him standing against the wall, what is he wearing?

A. He is wearing the same thing with the addition of an apron.

Q. Is it his choice to wear that apron?

A. Yes, it is.

Q. And the man in the foreground has chosen not to wear one, is that accurate?

A. Yes, that's correct.

* * * *

[310] Q. You say it is impossible to, keep up with the actual time spent on donning and doffing because people go to the cafeteria and do these various things, sometimes before they go to the locker room, correct?

A. True.

Q. But that is only because you don't have a rule against it, correct?

A. True.

Q. Management has the right to put in a rule that you will—if you want to go to the cafeteria, go there first and then go to the locker room and proceed directly to the production line, doesn't it?

A. It could.

Q. So Tyson is just trying to make it hard, isn't it, by not having a rule?

MS. PASCHAL: Objection. Foundation.

THE COURT: Overruled.

[311] BY MR. WIGGINS:

Q. Isn't it?

THE COURT: Overruled. You can ask him if Tyson is trying to make it hard.

THE WITNESS: I disagree because of the layout of the locker rooms, for example, the various rows of lockers, the time different individuals—individuals would take, it would be totally impossible for a supervisor to visually see and time each individual.

BY MR. WIGGINS:

Q. Okay. We will get to that second difficulty that you just told us about in a second; but let's talk about the first difficulty though. You agree that this question of some people go to the cafeteria first and sit around the cafeteria and may even put on some of their things in the cafeteria, that problem can be solved by a simple rule that says you will not go to the locker room until you are ready to dress and go to the production line, wouldn't it?

A. That is true.

Q. Okay. Now, let's go to the second problem you described. You say that the supervisor couldn't be in the locker room timing people. What are you talking about, stopwatch?

A. I am just even talking visually checking to see if people were physically donning and doffing in the specified time [312] window that you are discussing.

Q. Okay. But the Plaintiffs have never suggested that supervisors try to do this on an eyeball, one person at a time basis, have they?

MS. PASCHAL: Objections. Argumentative and assumes facts not in evidence.

THE COURT: How would he know? Sustained.

BY MR. WIGGINS:

Q. You can simply on your second problem put the time clock at the door of the locker room with the rule I described which is don't go to the locker room till you're ready to dress and go to the line and punch in right there, you now are capturing their time. Management has that power, doesn't it?

A. In theory, yes.

Q. It has seven time clocks at least, doesn't it Tyson at this plant?

A. I believe that is correct, yes.

Q. And Tyson tomorrow or maybe this afternoon could go take one of those clocks or however many it wants and put it at the locker room door and your second problem is solved and you can track the actual time, correct?

A. In theory.

Q. All right. Now, you have a seven-minute rule on clocking in that you have already told us about, don't you?

A. Yes, there is a guideline for that.

[313] Q. Now, you could apply the seven-minute rule by putting the time clock right where we said just in the last question at the locker room door and if someone takes too much time in their donning and doffing, you could flag it when it hit seven minutes and the supervisor could go check it out, couldn't he?

A. In theory, yes.

Q. Just like they do with gang time, correct?

A. Correct.

Q. With gang time the supervisors, every day, are charged with checking all 50 or 60 of their employees on whether they are getting the actual time for gang time, correct?

A. That's true.

Q. And it would be a simple matter, just say okay, check the donning and doffing time too, wouldn't it?

A. Again, in theory, yes.

* * * *

[325] Q. Okay. Now, about 70 percent of your employees of these production hourly jobs are knife-related employees, correct?

A. I believe that's close, yes.

Q. Okay. I heard you say in relationship to some of the pictures, I wrote it down repeatedly, you said that's what they were doing that day. Do you remember those type of caveats you put in there?

A. Yes.

Q. And that is because employees don't do the same job every day, do they?

A. It is not guaranteed, no. They could rotate to different jobs.

Q. You have a rotation program, don't you?

A. For some of the jobs, yes.

Q. An employee can come to work and start on one job and change during the day to another job?

A. That's correct.

Q. By rotation?

A. Yes, that's correct.

[326] Q. And they also can start on one job and then transfer to another job during the day, correct?

A. That is true.

Q. And I can come in and work one job on Monday, it might be knife-related, and come in on Tuesday and work a job that doesn't require a knife, correct?

A. Correct.

* * * *

[345] ELIZABETH T. STOUGH,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

THE COURT: Once you are comfortably seated, I have never seen a courtroom with two microphones before, so I don't know the function of them, but it is kind of neat. Go ahead.

EXAMINATION

BY MR. WIGGINS:

Q. Good afternoon.

A. Good afternoon.

Q. State your name, please.

A. Liz Stough.

Q. And you and I have not met before, I am Bob Wiggins and I am going to try to get you close to being done in 15 minutes. I don't know if I can. Tell us your job.

A. I'm the plant controller of the Storm Lake plant.

Q. And what does that involve?

A. That involves managing the financial side of the plant which means managing payroll, managing expenses, paying producers or paying truckers, those kind of things.

* * * *

[352] Q. Now, you have a seven-minute rule, correct?

[353] A. Yes.

Q. And tell us what the seven-minute rule is.

A. Well, we tell them to not clock in more than seven minutes prior to start time.

* * * *

[354] Q. You will get your gang time if you're on the line at 6:00 and still on the line at 4:00, correct?

A. The gang time is going to be when the line started and [355] when the line ended.

Q. And that's when the first hog comes that starts it and when the last hog goes by you, that ends it, correct?

A. Yes, yes.

Q. Is that what gang time is?

A. Yes.

* * * *

[371] Q. The K-cost—tell us what the K-code cost is.

A. That's the minutes that are given to people doing specific jobs for their—they might refer to as clothes change or additional equipment or whatever that they have to put on.

Q. And that's called pre and post-shift activities, correct?

[372] A. Yes, on the check.

Q. By pre-shift activities it means pre-gang time, correct?

A. Yes.

Q. And by post-shift activities it means after gang time ends and the person steps off the line, right?

A. It is referring to the time that they get done to take off and it is referring to the time that they would put stuff on.

Q. Okay.

A. Prior to working.

Q. And your department has nothing to do with checking or reviewing the time spent on those pre or post-shift activities?

A. No, we don't check those.

Q. And the supervisors and managers out in the departments, they are not responsible for reviewing or checking the actual hours spent on the pre-shift activities or the post-shift activities, are they?

A. I—I don't—I have no idea if they—if they look at that or review that. I haven't asked them. I don't know.

Q. But you do know that the only persons that you have ever come in contact with that assigns the K-code is someone over in the corporate office in Nebraska, correct?

A. I know that somebody developed that and developed how—how many minutes and which jobs it would apply to. That's [373] about all I know.

Q. You know that there is no local review or input into the pre and post-shift pay, correct?

A. Yes, we don't—we don't input that pre and post-shift pay.

Q. You don't review it or approve it, no one at Storm Lake reviews or approves the pre-shift pay or the post-shift pay?

A. We sign that report, it is on that report, so I am—I guess it gets approved; but—

Q. And the reason that no one is checking is because it is just a flat four minutes for a certain period of time and later it might have been raised for some people to as much as eight minutes?

MS. BURKHARDT: Objection. Lacks foundation.

THE COURT: Do you know the answer to that question?

THE WITNESS: Do I need to answer that question?

THE COURT: I said do you know the answer to that question?

THE WITNESS: You would have to repeat the question.

BY MR. WIGGINS:

Q. The reason no one reviews the time on an employee-by-employee basis for actual hours spent on these activities is because you just pay a flat rate?

MS. BURKHARDT: Objection.

[374] THE COURT: Overruled. Answer the question, if you can.

THE WITNESS: Okay. We pay the rate that was designated, that was developed, so depending on the job itself, the job code that was developed, it is something that is fed, we don't see—we don't see anything, we just know it feeds the report.

BY MR. WIGGINS:

Q. When you say we, you mean the Storm Lake people don't have anything to do with it, someone is feeding it over at the corporate office?

A. I'm really referring to my accounting department.

Q. But it is true from an accounting standpoint that the only people involved in inputting or causing the K-code time, the pre and post-shift activity time to be paid is the corporate accounting office?

A. It would be the corporate end.

Q. Where is the corporate accounting office?

A. The corporate accounting office is in Dakota—Dakota Dunes.

Q. And that flat rate that is paid is for pre and post-shift activities is just automatic by job code, correct?

A. Yes, by job code. I do want to add one more thing. When we are talking about—I just want to clarify we are talking about accounting or we're talking about payroll and our [375] payroll department is in Arkansas so—and I do have an accounting department in Dakota Dunes.

* * * *

[386] Q. Do you know of any effort that Tyson has made to determine the administrative practicality of capturing the pre-shift activities and the post-shift activities before and after gang time by a punch clock method?

A. No, I do not.

* * * *

Q. This system that you have described for paying a flat amount of minutes for the activities performed for the company after gang time ends and before it begins you have called K-code, have you experienced any administrative difficulties in tracking or paying

for those minutes every week that you issue the paychecks?

[387] A. I don't have any administrative difficulties. We run through the process like I told you and then—and the check prints and I'm not sure exactly what you're referring to, but I don't know of any administrative problems that I have.

* * * *

[388] Q. I don't mean to suggest to you that it was always four minutes, I recognize that it is in evidence that it later went to as much as seven or eight for some people; but I am talking about the period you had four minutes, that's the lowest amount you paid, I want to deal with that first, you're able to track the day that the employee works or if he's absent and the job that he's on to see if he is eligible that day for payment of the four minutes, correct?

A. I know that I can—my reports show on a daily basis what—what the—the person was here, what job code they were, and that the report—that feeds the report, the number of minutes that he would—he or she would get for that.

Q. And you have told us that there's no administrative difficulty, that the computer is just set up to do it automatically, correct?

A. I don't have any kind of administrative difficulty [389] with it.

* * * *

[393] Q. Let me turn to the page I am talking about. I am talking here about Section 3.7 of this Exhibit 233 called Record Keeping and it says, "Being subject to the FLSA, the company is required to make and keep

records concerning employees' wages, hours, sex, occupations, and other terms and conditions of employment," and you do that, correct?

A. Correct.

Q. That's part of your responsibilities, correct?

A. Yes.

* * * *

[406] DANNY PAUL HACKER JR.,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

[407] EXAMINATION

BY MR. WIGGINS:

Q. Good morning, Mr. Hacker.

A. Good morning.

Q. State your full name for us.

A. Danny Paul Hacker Junior.

Q. All right. And are you employed by Tyson?

A. Yes, sir.

Q. How long have you been working at the Storm Lake plant?

A. For 11 years now.

Q. All right. And what is your current job?

A. A cut general supervisor.

Q. Say it again.

A. A cut floor general supervisor.

Q. A cut? Tell us what the cut department is.

A. Cut department is where we make the primal cuts on the carcass.

Q. What is a primal cut?

A. That would be the picnics, butts loin, ham from the carcass of the hog.

Q. And how long have you held that job?

A. I've been in that position for almost two years now.

* * * *

[413] Q. Now, if you would, just so we can sort of speed through this and don't have to spend much time on it, for your—let's take—let me ask this question first: Is there a difference between what the employees in retrim and cut wear in terms of this protective equipment and sanitary gear?

A. Yes, there's a difference on every job.

Q. I realize on a job, but what about between the departments?

A. Each different job has different equipment requirements.

Q. Okay. I guess we will do it department—since you are going to cover two departments, let's do it separate. Will [414] you step down, please, and show us—pick out the items that the retrim department uses, I am not saying every job uses, but someone in the department is using.

THE COURT: Let's get a lapel mic then. Can you get one too, Mr. Wiggins? I don't mind that you move away from the podium, but every time you do, you are a little bit hard to hear.

MR. WIGGINS: Okay.

THE WITNESS: These would be membrane skinner gloves which are used by some of the team members in the department on retrim.

BY MR. WIGGINS:

Q. Lay them up here. We will separate them out.

A. Okay.

Q. For the record that is Exhibit 328.

A. This would be the hair nets, beard nets that are also used by the retrim department.

Q. That's Exhibit 330.

A. Kevlar glove which is used by some team members on the retrim department.

Q. Exhibit 324.

A. Rubber gloves, also used by some team members.

Q. Exhibit 333.

A. Mesh glove used by some team members.

Q. Exhibit 323. The gloves were Exhibit 333, I misspoke, [415] and the mesh is 323.

A. This is the mesh apron which is used by some of the team members in that department also. I don't see a tag on it. The tag fell off.

Q. Exhibit 321.

A. Frock is used by team members, some team members.

Q. Okay. That is Defendant's Exhibit 2001.

A. Belly guard also used by some team members.

Q. That is Plaintiffs' Exhibit 322.

A. Safety glasses which are used by some team members.

Q. Exhibit 339.

A. Rubber apron also used by some team members.

Q. All right. And that's Exhibit 336.

A. Earplugs.

Q. Exhibit 331.

A. Plastic sleeve.

Q. Exhibit 337.

A. Face shield used by some.

Q. Exhibit 340.

A. Cotton gloves.

Q. Exhibit 334.

A. Kevlar glove.

Q. Exhibit 325.

A. Hard hat.

Q. Exhibit 329.

[416] A. Mesh sleeve.

Q. Lost. Fell off. Mesh sleeve, we will have to find the exhibit for that one.

A. Nylon gloves.

Q. Exhibit 335.

A. Hearing protection.

Q. 332.

A. Plexiglass arm guards depending on the job both of those would be used.

Q. 326 and 327.

A. And depending on preference, the rubber boots.

Q. That's Exhibit 338.

A. The only difference for the cut floor is we have some team members that use the rain suits on the cut floor.

Q. All right. So all the items we just listed are used in both the cut and retrim department. The item that would be just for cut is the rain—

A. The rain suit, yes.

Q. All right. The rain suit is 342 for the record. Thank you. Tell us what employees are required to do by Tyson at the moment they step off the line at the end of gang time.

A. Excuse me?

Q. Sure. I will repeat. Tell us what employees in the cut and retrim departments are required to do by Tyson at the moment they step off the line when gang time ends at the end of [417] the day.

A. As they leave the line they go to wash their equipment.

Q. Okay. First thing they do is step off the line and do what?

A. Depending on their preference, some of them start taking off their equipment immediately, some of them wait till they get to the washroom.

Q. First thing they do is have to carry their equipment away from these—the line, correct?

A. If they take it off before they walk away from the line they would be carrying it otherwise they are wearing it.

Q. The employees are not allowed to leave their equipment on the production line, are they?

A. At the end of the day, no, we don't leave the equipment on the production line.

Q. They are allowed to leave some of their equipment right next to the line on hooks and that type of thing at the break period?

A. Yes, sir.

Q. At the end of the day they're required to gather all their equipment up, including their knives and scabbards and all the items you have listed here and take them away from the line, correct?

A. Yes.

[418] Q. They are required to carry that equipment over to the wash station, correct?

A. If they've taken it off, otherwise they would be wearing it, yes.

Q. And they are required to sanitize and wash the company equipment that's not going to be laundered overnight, correct?

A. Yes, the hard equipment, belly guard, knives, scabbard, they rinse those off.

Q. Okay. And when employees step off the line and gather their equipment and transport it over to the wash station, they are on unpaid time as far as gang time goes, correct?

A. That would be after gang, yes.

Q. Okay. Now, let's look at Defendant's Exhibit 2195 which is a video of this washing process and I believe it is in your department, but you will have to tell us. It is Defendant's 2195 is all I know.

MS. BURKHARDT: Is it one that was previously used?

MR. WIGGINS: It is the one I showed in opening statement.

(Defendant's Exhibit Number 2195 was played for the jury.)

* * * *

[420] A. That's a wash area, hoses, basically a big sink.

Q. Do you see the fellow on the left—all right. Back up just a little bit. Watch the fellow on the left. What is he doing?

A. It appears that he is cleaning off his steel.

Q. What is a steel?

A. Steel is a device used to maintain the sharpness of a knife.

Q. All right. And he appears to be using a rubber glove to scrub that steel, is that correct?

A. Yes, it looks like he's wiping it off with the rubber glove.

Q. Let's go ahead and watch him.

A. I was mistaken. He is using a green scratch pad.

Q. Okay. Was that a green scratch pad?

A. Yes.

Q. Where are the scratch pads kept?

A. They keep them in their frock pocket.

Q. What is the purpose of a scratch pad?

A. To help keep the steel clean.

Q. Why do you want the employees to keep the steel clean?

A. They want to keep their steel clean because it enhances their ability to keep the knives sharp which makes their job easier.

* * * *

[422] Q. All right. Now, before we start this up about that equipment that is being shown here in this video, approximately how many employees in the cut department are knife-using employees?

A. I couldn't tell you an exact number off the top of my head. I would say rough guesstimate is that there's something better than 60 percent of them that use knives.

Q. What about in the retrim department?

A. I would have to say just about the same.

Q. All right. Employees rotate around on different jobs from time to time?

A. At times, yes.

Q. Do you have a rotation program that moves employees from job to job for ergonomic reasons?

A. Yes, on certain jobs.

Q. What is ergonomic, what is the ergonomic program?

A. Our ergonomics are fitting our workplace to our team members.

[423] Q. So an employee might start off a shift on a knife job and end up on a non-knife job or vice versa, correct?

A. If necessary, yes.

Q. Let's watch this knife equipment, you said it is a chain, a scabbard, and the knives and the scabbard, let's see what is being done and tell us if this is what the employees are required to do. We are get—we didn't back it up far enough. Now, that's the dipping part, correct?

A. Yes.

Q. Let's go back to where the fellow started with what he is dipping there. Are you going back? I wanted to go back to the fellow that had the scabbard. We advanced it too far. Do you see this fellow on the left? Stop right there. Whoops. See that motion that he just did, he was holding a scabbard out and he was doing something. What was he doing?

A. Rinsing it off.

Q. Is that a bib hose of some kind?

A. Yes, that is a hose.

Q. What is the temperature that is causing all that steam?

A. 140 degree water.

Q. Why do you use that?

A. Helps to get the fat and grease and—off of the equipment.

Q. And is that something Tyson requires the employees to [424] do before they proceed on to the punch clock then to the locker room to store overnight?

A. Before they put it in the locker room, right, they have to wash it off.

Q. They are not allowed to put those items in storage between shifts without them being clean and free of things that might build up contamination, correct?

A. That would be correct.

Q. All right. And what else would this employee, using him as an example, we have seen him hold his belly guard and his scabbard and his knives, his steel up, he washes them, what else would he be washing at this wash station?

A. He has the option to wash off his gloves, his apron, he doesn't have to, he can just put those in his laundry bag, the hard equipment he would have to wash off that doesn't go in the laundry bag. All the other equipment could go in the laundry bag, his rubber apron, all the gloves, sleeves, all that could go in his laundry bag. He wouldn't have to do anything with those as far as rinsing them off.

Q. But you have seen this line of people here and people having to fill in the gaps when they occur, is that a normal occurrence that you have—you have a bunch of people there trying to wash off the end of the shift and have to wait their turn?

A. As people get off the line, they go there and they [425] finish up and leave. As you stated before, we have a rolling start time so as the people at the front of the line get off, they go to the washroom and they are leaving as the people behind them are coming up.

Q. But what we're seeing here when employees—one employee rolls off the wash line, another employee fills in, that's the normal way it works each day, correct?

A. Yes.

Q. Okay.

A. This just—as we're filling our lines.

Q. Let's go ahead. Looks like he's cleaning his boots there, correct?

A. Yes, it appears he rinsed his boots off.

Q. The boots, they don't go in the laundry bag, do they?

A. No, sir.

Q. And the—none of the hard items, including the belly guard, go in the laundry bag, do they?

A. No, sir.

Q. Just for the record, tell us which items do go in the laundry bag from your departments.

A. It would be the frock, all of the gloves, rubber apron, their mesh glove, hair nets if they choose to do so, the Kevlar sleeves.

Q. Anything that is fabric?

A. Any of the fabric items, yes, they can go in there.

[426] Q. None of the mesh items go in there?

A. That would be incorrect. The mesh gloves go in the laundry bag.

Q. Well, they're allowed to go in there or—the mesh glove or is it required to go in the laundry bag?

A. They're allowed to go in there.

Q. But employees are expected by the time they roll off of this wash line that we are seeing in this picture to have gotten themselves scrubbed down in the way we're seeing before they proceed into the locker rooms, correct?

A. Yes—

Q. All right.

A. —they are.

Q. Let's go ahead. Okay. Now, once they dip there at the end, they go—they have to walk on out of the production doors at some point, correct?

A. Yes.

Q. And that's—they go by the punch clock again, correct?

A. Yes, they walk by it.

Q. And they punch out?

A. Not necessarily.

Q. Okay. But, I mean, they're able to punch out right outside the production room door, correct?

A. They are able to, yes.

* * * *

[427] Q. Now, you normally find in your experience, don't you, that at the end of the day people are in a hurry to get home?

A. Yes, that would be true.

Q. And employees are wanting to get through these lines that we are seeing as quickly as possible and get to the locker room and get to the car and get about their business, correct?

A. Yes, that would be true.

Q. But employees are not allowed to leave, they're not free to leave until they've got all the company equipment washed, sanitized, transported to the locker room, the laundry items put in the laundry bag,

the bag pinned, and the pinned bag put into the hamper, correct?

[428] A. Yes, that would be correct.

Q. Until then they are not free to leave, are they?

A. They should do that before they leave.

Q. Okay. All of that is after gang time has ended, correct?

A. Yes, that would be after gang.

Q. Then when they come back in the next morning, they are required to go back to their locker where they left their equipment and to get the equipment out of the locker and get ready to go to the production line before gang time begins, correct?

A. Yes.

Q. And while they might go to the cafeteria if they desire to, they are not required to, are they?

A. They would have to go through the cafeteria to get to the locker room.

Q. But they're not required to do anything other than come from home, get out of their car in the parking lot, come in, and go—they can go straight to the locker room if they want to, correct?

A. Yes, if they choose to do so.

Q. And so the first thing that the company requires employees to do is to go to the locker room and obtain the equipment that the company wants them to carry to the line, correct?

[429] A. No, they have the option if they come in, they can—they will sit in the cafeteria if they want and

have their morning coffee or breakfast prior to going to do that.

Q. I apologize if I didn't make myself clear. What I was trying to ask was the first thing the company requires the employee to do each and every day they come to work is to go to the locker room and get the company's equipment out of the storage?

A. Yes.

Q. Okay. And they are required to unpin the bag—let's get the bag back in the picture. The bag has come back from the laundry room between shifts, correct?

A. Yes, that is correct. It is delivered into their locker.

Q. It is in the employee's locker, correct?

A. Yes.

Q. All the items that were thrown in there were washed together and they are in a jumble, correct?

A. They're in the bag, yes.

Q. They're not hung up for them in the locker piece by piece where you can just take a piece at a time, are they?

A. No, the bag is hung in the locker.

Q. The employee has to get the bag, start taking things out one at a time to get them untangled and he can hang them up in his locker at that point and then proceed to start putting [430] some of them on, correct?

A. Depending on how they choose to put their equipment on. Some people put it on as they take it out of the bag, not everybody pulls it out and hangs it up on the inside of the locker before they put it on.

* * * *

[431] Q. You require your production employees, it is their primary duty to produce uncontaminated meat, isn't that right?

A. I wouldn't say that's their primary duty.

Q. Certainly their duty is not just to produce meat, it is to produce uncontaminated meat, correct?

A. Yes, we would want to do that for the public safety.

Q. Right. And that's one of the—that's the employee's primary duty is to produce a sellable, uncontaminated product, correct?

A. I would disagree with that. Their primary duty is to stay safe.

Q. All right. You can't sell—you've got—you would go out of business if your employees are just sitting around staying safe, right?

A. It would be a balancing act, yes; but primarily they would have their safety as the number one priority.

Q. You can't market and sell that, can you?

A. I don't suppose they can, but I don't think we'd have anybody working for us if they were all hurt.

Q. I understand the point, but I am saying in terms of the company's business, it is in the business of producing and selling wholesome products, correct?

[432] A. Yes.

Q. Wholesome being uncontaminated, correct?

A. Yes.

* * * *

[434] Q. But that is the company policy that you are responsible for applying that employees are supposed to be committed to producing a wholesome, sound product and they can be disciplined and fired if they don't?

A. That would be true.

Q. Okay. Let's go to the Rules in this document that is in evidence, 44 is one of the items that I want to ask you about because it is about this locker we have been talking about. Rule 44. You told me that employees in your two departments, cut and retrim, don't have to take everything out of the bag and [435] hang it up, they can just put it on as it comes out of the bag and I am not disagreeing with you, but this Rule 44 does have some requirements to it of not—let's just read it. "While team members are putting on their equipment, they should leave the rest of their PPE hanging in their lockers and put them on directly from there. Do not lay them on the bench or floor," correct?

A. Yes. If they leave their laundry bag hanging on the hook in their locker, they could take it out of there and put it on.

Q. Okay. All right. That's fine. But the reason for that is to prevent the laundered items from becoming a source of meat contamination, correct?

A. Yes, you wouldn't want to lay your clean frock on the floor.

Q. By the same token you want the employee, once he's done this, that he's directed to do in this Rule 44, once they've got that equipment, their sanitary gear on, their frock is on and their hair net and beard net and that type of thing, you want them to keep it free

of contamination while they get to the line to start using it, correct?

A. Yes.

* * * *

[439] Q. But you would agree the biggest departments at the plant in terms of hourly production employees are your two departments that you work in, cut and retrim, correct?

A. The two combined, yes.

Q. And what you have been telling us about here this morning and will continue to tell us as we go along covers those 920 employees, correct?

A. Depending on the job, yes.

Q. Okay. And all 920 employees in cut and retrim are [440] required to wear the white frock except the janitors, correct?

A. That would be correct.

Q. How many janitors?

A. I believe we've got—it varies depending on what we have going on, it could be from—anywhere from three to five on the cut floor and two to three on the retrim side.

Q. Okay. So well over 900 employees on any given day in cut and retrim are required to wear the frock, correct?

A. Yes.

Q. Required to wear the hair net, correct?

A. Yes.

Q. Required to wear the beard net if they have facial hair, correct?

A. Yes, if they have facial hair.

Q. Required to wear the hard hat?

A. Yes.

* * * *

[446] [Q.] Employees, when they come in in the morning, may start on one job and end up on another job on the same shift, correct?

A. Yes, that is true.

Q. And that's because sometimes people don't show up for work or get sick while they're at work or for various needs you have to move people around to keep your line running, correct?

A. Yes, that would be correct.

Q. And you have the right to move employees from their assigned job or their owned job to another job as needed, correct?

A. Yes.

Q. In fact, you can do it on a momentary basis or you can actually transfer them temporarily to another job, correct?

A. For the day, yes.

Q. And you have already told us about your rotation program, correct?

A. Yes.

Q. And an employee can work double shifts sometimes, [447] correct?

A. Yes, people—

Q. That's another way of filling in—I am sorry, I overspoke on top of you. What were you saying?

A. Yes, people do work overtime at the plant.

Q. And one form of that is a double shift, same day, you work two shifts, correct?

A. Yes.

Q. And that's to fill in gaps with—that are caused by missing people, correct?

A. Yes.

Q. And employees may have to work a double on a different job than they worked on their regular shift, correct?

A. If they choose to do so, yes.

Q. All right. So an employee during a part of the day may be a knife—on a knife job and another part of the same workday be on a non-knife job, correct?

A. Yes, that would be correct.

* * * *

[457] Q. Look at page 48, line 16, question, "You would agree that Tyson Foods is in the business of processing and providing a safe, uncontaminated, finished pork product for sale to the [458] public, are you not?" Answer, "That would be part of our core values, yes."

"Is that the main business that you're in, providing safe, uncontaminated finished pork product for sale at this facility?" Answer, "That's our primary business, yes." Do you agree with that?

A. Yes, that is what I said.

Q. Okay.

A. Cutting meat is our primary business. I wouldn't say that we would do that to the—where we would

blow off the safety of our team members and do that at no cost; but yes, that is the business that we are in is to cut meat.

Q. Not in the business of cutting meat, you are in the business of cutting safe, wholesome, uncontaminated meat, correct?

A. Yes, we would want that to be safe, yes.

* * * *

[473] Q. Do employees have to sanitize their equipment as they walk in in the morning?

A. Yes, ma'am.

* * * *

[487] Q. Does the Storm Lake plant have a rule about how long before an employee's scheduled start time they are supposed to clock in?

A. Yes, we have a policy they should not punch in more than seven minutes before their start time.

* * * *

[493] Q. And at the end of the shift might employees have switched jobs, might they change jobs during the day?

A. Yes, that happens quite often.

* * * *

[497] Q. Does the amount of time it takes an employee to don their PPE and standard items vary based on the number of items being worn?

A. Yes.

Q. So in your experience could it take an employee who [498] wears more items a little bit longer than an employee who wears less items to don those items?

A. Yes, ma'am.

Q. There were some questions earlier about what employees are allowed to wear. Are employees allowed to wear optional equipment?

A. Yes, ma'am.

Q. Are they allowed to wear additional items that are not required by the company?

A. Yes, ma'am.

Q. And if an employee does a job that doesn't require rubber gloves, would the employee be permitted to ask for a pair of rubber gloves if they wanted to wear them?

A. Yes, ma'am.

Q. If employees choose to wear optional items, might it take them a little bit longer to put on their equipment and standard items than somebody who wears only the required items?

A. Yes, ma'am.

Q. I think you mentioned earlier, what—what was the temperature on the cold side?

A. We keep the room at approximately 45 degrees.

Q. Do some employees choose to come to the plant with a sweater or sweatshirt to wear?

A. Yes, ma'am.

Q. Do some employees carry those in from home?

[499] A. Yes, ma'am.

Q. And do some employees put those on in the locker room?

A. Yes, ma'am.

Q. In your experience why would an employee bring a sweatshirt or a sweater with them and put it on before work?

A. If they wanted to wear it for comfort, if it is summertime and it is hot outside, obviously don't want to wear a sweatshirt when it is 95 degrees out, carry it and put it on when you get into the plant.

Q. If an employee chose to do that, to bring a sweatshirt and put it on in the locker room while they are putting on all of their other items, would it take that person a little bit longer to get dressed than somebody who doesn't choose to bring a sweater or sweatshirt to put on?

A. Yes, ma'am.

* * * *

[501] Q. You mentioned earlier in response to a question that some employees wear their required items or their optional items that they choose to wear under their frock and some team members might wear those same items on the outside of their frock. Do you remember that testimony?

A. Yes, ma'am.

Q. Is that just a matter of choice whether they wear it inside or outside?

A. It is a matter of the personal preference.

Q. The items that employees wear on the outside of the frock, do they have to take those off before they go to break?

A. Yes, ma'am.

Q. The employees that wear items on the inside of the frock, are they allowed to keep those on when they go to break?

A. Yes, ma'am.

[502] Q. The employees who take off the items on the outside of their frock, does it take them maybe a little bit longer to get their items off and leave the floor than somebody who puts all their items under their frock?

A. Of course. If you wore your mesh sleeve, mesh apron on the outside of the frock, it would take that much longer to get that off than if you didn't have to take that off.

Q. Is that taking longer because of the employee's choice to wear the items on the outside as opposed to the inside?

A. Yes, that would be their choice.

MS. BURKHARDT: If we could pull up Plaintiffs' Exhibit 301 which was admitted yesterday I believe.

Q. All right. Mr. Hacker, this is a document that was admitted into evidence yesterday. Do you recognize it as a list of the required knife-related items that are required for certain positions within the plant?

A. Yeah, it looks like a requirement of safety equipment that's required to be worn for each job.

MS. BURKHARDT: Connie, if you could scroll down.

Q. You let us know when we get to the positions that look like the processing side jobs.

A. You are starting right there at department 721.

MS. BURKHARDT: Thank you, Connie.

Q. So, Mr. Hacker, do the positions that are now shown on the screen look like processing side job positions to you?

[503] A. Yes, these would be jobs that are performed on the cut floor.

Q. And how do you know that?

A. I know the—what the positions are for what it says on the thing, department numbers tell me what department they are in.

Q. And are you familiar generally with the department numbers for the processing floor jobs?

A. Yes, ma'am.

Q. Are you familiar generally with the names of the different positions on the processing floor?

A. Yes, ma'am.

Q. Is that true for both the cut and the retrim?

A. Yes, ma'am.

Q. All right. If you would look at the first row across the top, the one that lists out the equipment, do you see that?

A. Yes, ma'am.

Q. Are those items certain items that might be worn by employees on the cut or retrim floor?

A. Yes, ma'am, some of them are.

Q. Which ones would not be?

A. I don't believe that we have anybody that wears shin guards or a knocker vest, that would be the first column and the next to the last column.

Q. Do you have employees on the processing side who wear [504] legging aprons?

A. No, that also. Column F

Q. Do you understand what the different notations, the numbers in the boxes on this chart represent?

A. Yes, it appears to denote how many of that particular piece of equipment they're required to wear.

Q. And are you generally familiar from your personal knowledge with the equipment that is required for the different positions on the processing side?

A. Yes, ma'am.

Q. If you had a question or needed to test your memory, how would you do that?

A. I would pull up the JSA to see what is required for the particular job.

Q. And what is a JSA?

A. Job Safety Analysis, shows the required safety equipment and a rough outline of the job and what safety points there are for it.

Q. If you could take a look at the job on line 122, the trim butts supreme lean position. Do you see that?

A. Yes.

Q. Is that a job on the processing side?

A. Yes, that would be a job on the cut floor.

Q. Can you tell us what items are required for this position?

[505] A. By this list there's one belly guard, one scabbard, one steel, one mesh glove, two Polar sleeves, and one—that should be Plexiglass arm guard.

Q. And in your experience does that sound right in terms of the items that are required for that position?

A. Yes, ma'am, that sounds correct.

Q. If you look at the positions that are up on the screen, do you see other positions that required a belly guard?

A. Yes, ma'am.

Q. Can you give us some examples of some of the other positions that require a belly guard in addition to the trim butts supreme lean position?

A. Right above that, raised neck bones, right below it, rob neck bones.

Q. The raised neck bones, and you said the raw neck bones?

A. Rob next bones.

Q. Rob neck bones. Okay. Are there positions that do not require the belly guard?

A. Yes.

Q. Can you give us some examples of those?

A. Right above and below it, skin butts and box multi-vac butts.

Q. If you look again at the trim butts supreme lean position, you see the number two in the Polar sleeve column?

[506] A. Yes, ma'am.

Q. What does that indicate to you?

A. That they would wear a Polar sleeve on each arm.

Q. Are there other positions that wear a Polar sleeve on both arms on the processing side?

A. Yes, ma'am.

Q. Can you give us some examples?

A. Rob neck bones would be one, looks like rob lean from fat back would be another.

Q. Are there some positions on the processing side that might only wear one Polar sleeve?

A. Yes, ma'am.

Q. Can you give us some examples of those?

A. Raise neck bones.

Q. Are there some jobs on the processing side that don't wear any or not required to wear any Polar sleeves?

A. Yes, ma'am.

Q. Can you give us some examples of those?

A. Operate butt picnic saw, skin butts, box multi-vac butts again.

Q. All right. If we could take a look at the position at line 126, it is the pack feet tails position.

A. Yes, ma'am.

Q. You see that job?

A. Yes, ma'am.

[507] Q. What items are required, what of these safety—knife-related safety items are required to be worn in that position?

A. None.

Q. And how do you know that?

A. There's nothing denoted in any of the boxes for it.

Q. So is it true then that some positions on the processing side wear certain items while other positions might wear no knife-related items?

A. That would be true, yes.

Q. Let's look at one more job, if we could look at line 139, the reject butcher. What does the reject butcher do?

A. Reject butcher takes care of any product that falls on the floor or becomes contaminated, that's an abscess, grease, whatever the case may be, and trims or cleans that to our specifications.

Q. Now, if you look at the reject butcher position, what items are required to be worn in that position? What knife-related safety items are required to be worn in that position?

A. It would be one mesh apron, one scabbard, one steel, one mesh glove, one Polar sleeve, and one mesh sleeve.

Q. Based on your experience does that sound like an accurate list of items required for that position?

A. Yes, ma'am, that would be correct.

[508] Q. The reject butcher wears one mesh apron. Do you see any other employees listed on the page we have up who also wear a mesh apron?

A. Yes, ma'am, raised neck bones.

Q. Also wears a mesh apron?

A. Yes. Excuse me. No, wrong thing. Mesh apron, no. Mesh sleeve, yes. I looked at the wrong column. Sorry about that.

Q. That's okay. Is it true that some employees on the processing side wear a mesh apron while others do not?

A. Yes, that would be true.

Q. Looking at the three positions that we have looked at, is it accurate that what an employee wears in terms of the knife-related safety items will vary from job to job?

A. Yes, ma'am.

Q. And in your experience out on the floor based on what you personally observe, is that true that employees will wear different items depending on the job?

A. Yes, ma'am.

Q. Is it true some employees wear some items that other employees do not?

A. Yes, very true.

Q. And are some employees required to wear no items while other employees are required to wear a few items?

A. Yes.

* * * *

[510] Q. Mr. Hacker, in looking at this Plaintiffs' Exhibit 301, is it—does this demonstrate that certain employees are required to wear certain items for their positions?

A. Yes, ma'am.

Q. And in addition to the items that are shown here, in addition to these knife-related safety items, some employees [511] wear standard items like a hard

hat or a frock, they would be required to wear certain of those types of items as well, right?

A. Yes, ma'am.

Q. If an item is not required to be worn for a job, so if it is not listed on the JSA or it is not one of those items that everybody has to wear like a hard hat or the frock, can an employee perform that job with just those items?

A. Yes, they would be able to perform it.

Q. If an employee wanted to wear or use an optional item in addition to the things that are required, we would allow them to do that, right?

A. Yes, ma'am.

Q. But an employee wouldn't necessarily need those items that they are choosing to use, those optional items in order to technically perform that job, right?

MR. WIGGINS: They are leading too much. We object.

THE COURT: Sustained.

BY MS. BURKHARDT:

Q. Would an employee be able to perform—technically perform their job without the optional items they choose to wear?

A. Yes, ma'am.

* * * *

[533] Q. Employees are not allowed to touch the meat, handle the meat with their bare hands, are they?

A. They should be wearing gloves if they are handling the meat.

* * * *

[545] DANIEL ARNOLD LINDGREN,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WIGGINS:

Q. Good morning.

A. Morning.

Q. State your full name, please.

A. Daniel Arnold Lindgren.

Q. And what is your job at Tyson?

A. I'm the general supervisor on the cut floor.

Q. And how long have you been a general supervisor on the cut floor?

A. Since about August of 2008.

[546] Q. How long have you worked at the Storm Lake plant?

A. I started December 9, 2003.

Q. And have you ever worked in the meat packing industry before?

A. No.

Q. All right. And how long have you held your current job? I may have asked you that.

A. As a general supervisor?

Q. General.

A. I believe it was about August 2008.

Q. August?

A. 2008.

Q. Eight. Who did you replace?

A. Kris Jiminez.

Q. Kris Jiminez?

A. Yes.

Q. All right. You and I have never met before, but your deposition was taken by some other lawyers, correct?

A. Correct.

Q. As—what were you before a general supervisor?

A. For just about a year before that I was a front-line supervisor on the cut floor.

Q. You are going real fast and I am not hearing.

A. For about a year before that I was a front-line supervisor on the cut floor. Prior to that I was a front-line [547] supervisor on the kill.

Q. How long were you in the kill department?

A. About three and a half years.

Q. So you have knowledge of both the cut department and the kill department, correct?

A. Correct.

Q. As a supervisor were you responsible for daily review of the gang time to make sure everybody got their—their full amount of time that they worked?

A. I was responsible for documenting gang time, yes.

Q. All right. And is that known as the editing process in the T and A system?

A. No, the gang time gets inputted on the daily report whether it is cut, kill, or retrim and the supervisor goes through the previous day's hours to make sure everybody got paid accordingly.

Q. Everybody got paid for the full actual hours they worked, correct?

A. For the gang time plus any hours they had before or after shift.

Q. And those would be hours before or after shift on setup or teardown, correct?

A. Scheduled setup or teardown time, yes.

* * * *

[549] Q. Except for that management support person that is paid punch to punch, everybody else is on gang time under you, correct?

A. I have right now six supervisors that work for me, everybody that they manage is on gang time.

Q. Now, the minimum amount of equipment that employees under you use are the boots, the aprons, the hard hats, the gloves, earplugs, and the frock, correct?

A. Not entirely. Boots—well, over-the-ankle approved work shoes, hard hat, and earplugs are the only things that are required.

Q. But I'm saying the employees under you, it is minimum, the least they wear are the boots, the aprons, the hard hats, the gloves, earplugs, the frocks, hair nets, and beard nets, correct?

[550] A. That would vary by position. They don't necessarily wear—

Q. I am talking about the positions that have the least equipment. This is a question you were asked in your deposition. Do you remember?

A. Yeah, I think it says further in my deposition I went back and corrected that statement. Not everybody wears all that equipment. My manifester, the management support person wears hard hat, earplugs, boots.

Q. I understand not everyone, that's why I asked the minimum, the least that your employees wear, I want to stick with that, okay? I want to talk about the least equipment that anybody wears. It doesn't mean everybody wears it, just the least that anybody wears, okay? Didn't you answer in your deposition that it was the boots, the aprons, the hard hats, the gloves, earplugs, the frock, and the hair net and the beard net?

A. Initially in my deposition that's what I said, yes.

Q. Were you wrong?

A. I may have overstated a couple of people. Mule drivers probably have the least amount of equipment out of anybody. They would wear over-the-ankle work boots, hard hat, earplugs, and safety vest.

Q. What does a mule driver do?

A. Drives a mule.

Q. Is that a live animal mule?

[551] A. No, it is a motorized pallet jack.

Q. And what is he driving that—what is he transporting on that?

A. Combos of product.

Q. I didn't catch the word. What?

A. Combos of product.

Q. Combos?

A. Yes.

Q. What is a combo?

A. It is a cardboard box with plastic liner that weighs about 2,000 pounds when it is full.

Q. So he is not handling meat, correct?

A. They do handle some.

Q. Is it packaged meat?

A. No, it is raw materials. They move product to make weight in combos.

Q. Is that a job someone can own?

A. Yes.

Q. How many mule drivers do you have?

A. Presently I have nine.

Q. When you answered in your deposition that the minimum, the lowest—least equipment that employees wear in the department, I know you corrected it with a mule driver, put that aside, when you answered in your deposition the minimum was the boots, the apron, the hard hats, the gloves, the earplugs, the [552] frock, and hair net and beard net, what jobs were you talking about?

A. A person wearing that product—or that configuration of equipment would probably be a ham chop or shoulder chop operator.

Q. Ham job?

A. Ham chop, shoulder chop.

Q. Shoulder chop.

A. There's a couple others.

Q. All those ham chops, shoulder chops, and couple others, how many employees are we talking about?

A. Between those two jobs there's four.

Q. There's four in the ham chop and shoulder chop?

A. Two each, total of four.

Q. These other ones you can't remember the names of, can you give us an idea what jobs those are?

A. Those are pretty much all non-knife jobs.

Q. Okay.

A. Ham chop, shoulder chop, trim bone, hind hook sides, I mean, there's—there's quite a list of jobs that don't require anything.

Q. Do you know how many employees are in those jobs?

A. Off the top of my head probably 14, 15. Excuse me. Probably 18.

Q. So would you agree that the vast majority of your [553] employees are in knife jobs?

A. Yes.

Q. Give me your percentage that is your best estimate of the percentage of employees under you that are in knife jobs.

A. Including Whizard blade?

Q. Yes.

A. 70 percent.

Q. Okay. By the way, I don't think I have asked you yet, how many employees are under you?

A. Fluctuates back and forth between 220, 230.

Q. And that is in your current job as general supervisor, correct?

A. Correct.

Q. How many did you have when you were the front-line supervisor cut department?

A. The main break I had 19.

Q. How many were under you as a front-line supervisor in kill?

A. Anywhere from 19 to 45. I worked all the different departments on the kill.

Q. You said between 19 and 45?

A. Yeah. Largest department on the kill floor is I think 45 people.

Q. Okay. You would agree, would you not, that these various sanitary steps or items or equipment that Tyson has and [554] requires, that the primary benefit from those is to be able to roduce a safe, wholesome, uncontaminated meat product, correct?

A. That is a benefit of wearing the equipment. Our top priority is always safety.

Q. But you said in your deposition it was—that the primary benefit of that was to enable Tyson to produce a safe, wholesome, uncontaminated product, correct?

A. That would be the company's benefit of it.

* * * *

Q. Page 76, line 23. I will ask the question—I will read the question and you read your answers. Quote, "Do you—" question, "Do you agree with the statement that Tyson is in the [555] business to produce a safe,

uncontaminated, finished pork product? Would you agree with that statement?" And your answer?

A. "Yes, that's what we're in the business to do."

Q. Question, "And as part of your supervisor managerial duties, part of your responsibility is to make sure that Tyson's employees are complying with good manufacturing practices which are established by Tyson and the USDA and to the extent that certain of your customers have additional good manufacturing practices, it is your responsibility to make sure that they're complying with all those, correct?"

A. "Yes, that's correct."

Q. Question, "Likewise, it is part of your job to make sure that all the tools or items that they utilize in this work are free of contamination such as knives, steels, belly guards, et cetera. These are to be maintained in an uncontaminated fashion during the work they are utilizing it, is that correct?"

A. "Yup, still accurate."

* * * *

[556] Q. Question, "If employees don't maintain their working tools or protective equipment in a sanitary manner, they can be subject to discipline, is that correct?"

A. "That's correct."

Q. "The reason they would be subject to discipline is because its primary concern and primary benefit for Tyson Foods is that they produce a completely uncontaminated product available to the public." Read your answer. Wasn't it your answer—I am quoting—"The primary concern for any consumer that the product is free of contamination."

Question, "And that's Tyson's primary concern?" Answer, "That's our primary goal to produce—" correct?

A. Yes. It appears part of my answer is cut off there too.

* * * *

[557] NICOLAS LOVAN,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

THE COURT: When you are comfortably seated there, pull the microphone a little closer to you. Great. Thank you very much. Go ahead, Mr. Doolittle.

MR. DOOLITTLE: Thank you, Your Honor.

[558] EXAMINATION

MR. DOOLITTLE:

Q. Good afternoon. Would you state your name and introduce yourself the jury, please?

A. I am Nicolas Lovan.

* * * *

Q. And where are you currently employed?

A. Tyson Foods.

Q. Is that the Tyson plant in Storm Lake that is the subject of this lawsuit?

A. Yes, sir.

[559] Q. All right. How long have you been employed with Tyson in Storm Lake?

A. 28 years.

Q. Okay. And do you remember the day when you were hired and went to work for Tyson?

A. May 10, 1983.

Q. Have you worked continuously since then?

A. Yes, sir.

Q. Okay. Did you recently have a change in your job classification?

A. Yes.

Q. Okay. Let's focus on the period of time from March 2004 up until approximately June of last year. During that period of time what was your job and what was your classification?

A. Utility man on ham line.

* * * *

[561] Q. And as best as you can, I would like you to tell the ladies and gentlemen of the jury what those items, that ensemble that you don and doff on a daily basis, if you can go by the list, go down the list of what you put on every morning.

MR. SAPP: Your Honor, no objection. Can we have clarification as to which job position counsel is referring to?

MR. DOOLITTLE: I'm sorry. I'm sorry. That's fair. His classification is a utility man, Your Honor, and that would be utility man on the ham line retrim on the day shift.

THE WITNESS: Okay. I have hard hat, hair net, earplugs, white frock, cotton glove, two of them, rubber glove, mesh glove, mesh sleeve, Kevlar sleeve, belly guard, a steel-toed boots, safety glasses, and safety glasses, yes.

BY MR. DOOLITTLE:

Q. Anything else?

A. Scabbard, chain, and steel.

Q. Are those the—I'm sorry.

A. Knife too. Knife.

Q. Okay. Are those the items that you are required to don and doff every day?

A. Yes, sir.

* * * *

[567] Q. Okay. Please continue.

A. After I put my lunch box on the shelf, I continue walking to my locker and then I open the lock, unlock the padlock, open the door, grab my laundry bag, unpin it, and put it on the hook. After that I take the jacket which I have in the locker or sweater, put it on, zip it up, and then take the cotton glove from open laundry bag, put in my non-knife hand, and then the rubber glove and then the mesh sleeve and then mesh glove.

After that I grab the Kevlar sleeve, put on my right arm, knife arm, cotton glove, rubber glove, and I get the boots inside the locker out, take my tennis shoe off, put in the locker, and then after that I take the white frock, put it on, button it up. After that I take the hair net which I hang on the hook, put it on. Beside that is my hard hat, I put the hard hat on and the earplug on.

After I done I grab the chain with the knife and steel, put it on my shoulder, hang it on my shoulder, belly guard, hang it on my shoulder because I don't want to put it on yet. I have to stop at a dip tank so I

hang it on my arm. And then I check over if I have all my equipment on.

Oh, one last thing, safety glasses. I take the safety glasses, put inside my frock pocket and then I look around, see if I have everything, and after that I shut the locker door and start walking to the punch clock.

[568] Q. That was my next question. Do you do all these activities that you described before you punch that clock?

A. Yes, sir.

Q. All right. And so then you start walking from the—from the locker room and where do you go from there?

A. From the locker room I go to hallway to the punch clock.

Q. Is the punch clock located between the—where you walk out of the locker room and your work area, is it located on the way?

A. The punch clock located on the way to the dip tank and the locker room.

Q. Okay. So what do you do when you get to the dip tank?

A. I take the belly—the knife, scabbard with the chain and the steel and belly guard, dip it in the tank and my mesh glove, dip it in the tank.

MR. DOOLITTLE: May I be relieved from the podium for one second, Your Honor?

THE COURT: You don't need to ask permission.

BY MR. DOOLITTLE:

Q. Mr. Lovan, I have just handed you Plaintiffs' Exhibit 322. Could you tell us what that is?

A. This is the belly guard.

Q. Is that the type of belly guard that you are required to dip in the sanitizing solution tank before you go into the [569] work area every day?

A. Yes, sir.

Q. After you—tell us again what all do you dip in the tank, the dip tank, what all do you dip in there besides the belly guard?

A. Chain with scabbard and knife and the mesh glove.

Q. You are talking about a chain, what kind of chain is this and what is it utilized for?

A. It is a link chain that you hook the scabbard and the steel onto.

Q. Is that worn around your waist throughout the day?

A. Yes, sir.

Q. And how many knives do you have?

A. Two knives.

Q. And where are those knives and scabbard kept? Are they in the locker at the beginning of the day?

A. Yes, in the locker, yes.

Q. After dipping the scabbard and the mesh and the steel and belly guard in the tank, where do you proceed then?

A. And then I walk to my work station.

Q. What do you do when you get to your work station?

A. When I get to the—to my work station, I am steeling the knife waiting for the ham to come.

Q. I think you testified that your particular line time was about 6:17?

[570] A. 6:17, yes.

Q. Do you normally try to arrive before 6:17?

A. Yes, sir.

Q. Okay. Can you estimate for me approximately how long it takes you from the time you open your locker and retrieve your items out of your bag, your personal protective equipment, your sanitary items out of the bag, from that point in time until you get to your work station, this would include walking and dipping and to your work station, approximately how many minutes does that take you?

A. Eight to nine minutes.

Q. Let me ask you this: What—what do you base that on?

A. Well, from doing it every day for the past 28 years. It is my routine.

Q. Okay. Well, that is another question. Does your routine normally change or is it the same or—

A. It's the same.

Q. And you said you have done that for 28 years?

A. Yes, sir.

* * * *

[590] Q. All right. And what do you do at the end of the day?

A. At the end—

Q. Before you can—before you can leave the line and leave the plant and go home, what do you do?

A. At 2:47 the last piece of ham get to my station. I trim that piece then I get off the work station to the washroom.

Q. Approximately how far is it from—from your station on the line where the last piece of ham passes you, how far is that from where you go to the wash station? Approximately how far is that?

A. Approximately 30 second to a minute walk.

Q. Walk?

[591] A. To walk.

Q. When you get there, what kind of an apparatus do you have in front of you to—where you do your washing?

A. When I get there there's a lot of people, worker that try to wash their equipment too so sometime I have to wait in line to get to the hose.

Q. Do you have to wait in line every day?

A. Most of every day.

Q. Okay. Now, how many—at this period of time, approximately how many people are getting off at this period of time?

A. Sometime we have loin line that get done same time that we do so when loin line get done it is pretty crowded.

Q. Okay. Does the loin line—does the loin line, do those folks get off at the same time as the ham line that you work on in retrim?

A. They get off pretty, you know, two to three minute maybe, you know, prior to our time.

Q. And how many folks work on that loin line?

A. I say about 100, 110.

Q. And how many folks work on the retrim ham line that you work on?

A. I say about 80.

Q. That's, my remedial math which I am terrible at, that's about 190 people, does that sound about right?

[592] A. That sounds about right.

Q. And does that 190 people, do they all utilize the same wash area?

A. Yes, same wash area.

Q. Do you know how many—and what do you use to wash up with there? Are there hoses, brushes, what do you use?

A. We have a hose, first I go there, I take my belly guard off and then my chain with scabbard, knife, and steel, hang it on the hook, hose it down really good, and then I hose my mesh glove to get it clean. That's about it.

Q. Now, is the water that you are using to clean up with, is this water hot or cold or—

A. It's hot.

Q. How hot is it?

A. Oh, I don't exactly know. About, you know, over 100 degree.

Q. And how many—how many—you said there was about 190 people that utilize this wash area. How many hoses are there? Do you know?

A. I say about 50.

Q. 15?

A. 50.

Q. 15?

A. Not teen, 50.

THE COURT: 50.

[593] THE WITNESS: 50.

BY MR. DOOLITTLE:

Q. 5-0?

A. 5-0, yes.

Q. For 200 people or 190 people?

A. Yes.

Q. Now, how long does it take you to wash this equipment that you have just described for the jury in the afternoon, how long does that take?

A. I'd say about two minutes.

Q. Okay. And then how long does it take you to walk from there back to the locker room?

A. About one minute.

Q. Okay. And when you get to the locker room, tell the ladies and gentlemen of the jury what your routine is in the locker room.

A. Okay. After I get to the locker room—

Q. Let me ask you one question. I don't mean to interrupt you. After you wash your equipment down that you have described, is there anything you do between that wash station and the locker room?

A. Okay. After I wash it down, I grab my belly guard and chain with steel and scabbard, knife to the dip tank and I dip my equipment, mesh glove. After I dip that, I go through the door, take a left to the punch card.

[594] Q. All right.

A. And then I walk straight to locker room.

Q. All right. What do you do when you get to the locker room?

A. After I get to the locker room, open the padlock, open the door, and I start taking my equipment off, first hanging my belly guard on the hook inside the locker, second hang the knife, chain, scabbard on the hook in the locker, and I take my hard hat, my hair net, earplugs off, hang in the locker.

After that I take my white frock off, take the laundry bag out, put the white frock in the bag, rubber glove, both hand, put it in the bag, mesh glove first, mesh glove before rubber glove, mesh glove first, and I take it off, hang it in the locker, and after that I take a rubber glove off, put it in the laundry bag, and then cotton glove, put it in the laundry bag.

After that I take the mesh—mesh sleeve, unhook the mesh sleeve from the front, swing it to the back, snap it out, pull it out and hang it in the locker. Pinch the clip on mesh sleeve—Kevlar sleeve on my right-hand side, pull it down, put it in the laundry bag. Take my jacket or sweater and unzip it, pull it out, and then put it in the laundry bag to be washed.

After that I take my tennis shoe out from the locker and take my boots off, put on the tennis shoe, put my boots back in the locker, and I check if I am missing anything, double [595] check, and then if everything in

the locker, I shut it, grab the dirty laundry bag, throw it in the basket, and head to the cafeteria.

Q. All right. When during the day do you get your punch card back from your wife?

A. During break time.

Q. Is that on your lunch break?

A. Yes.

Q. Is that unpaid lunch break?

A. Yes.

Q. All right. Do you ever stop and socialize in the locker room at the end of the day?

A. Normally I don't do that.

Q. Okay. Do you ever take any equipment home at the end of the day?

A. No, sir.

Q. From the time—from the time the last ham passes in front of you, approximately how long does it take you to walk from your station on the line to where you wash and sanitize this equipment that you have described, to the punch clock where you punch out, to the locker room where you store your personal protective and sanitary equipment, until the time you have completed putting the stuff in the laundry bag that Tyson furnishes you and put it in the—is it a hamper, a dirty clothes hamper, is that what it is?

[596] A. Yes.

Q. Until the time you place that bag in that hamper, approximately how many minutes does that take you based upon your routine?

A. I say about nine to 10 minutes.

* * * *

[597] Q. Yesterday, Mr. Lovan, as I understood it, you estimated your total time from the time you say you open your locker to when you usually arrive at your usual work station was a total of about eight to nine minutes, correct?

A. Yes, sir.

Q. I will find it here in a minute on the walk time as to what your estimate was yesterday from walking from the locker to your work station; but as I look for that, even if you think you estimated a minute to the dip tank, it is only about 30 seconds from the dip tank to your work station, correct?

A. Yeah, approximately, yeah.

Q. So I am just trying to be accurate and fair in understanding what you told us yesterday that even if you count [598] the dip tank—if you are saying it is 30 seconds from the dip tank to your station and it is a minute from the locker to the dip tank, can we agree that your best estimate, and I realize it is an estimate, of walking from the locker to your work station is about not more than a minute and a half roughly, is that fair, sir?

A. Yeah, something like that, if you don't have a lot of people line up, yes, at the dip tank.

Q. So what I am trying to understand is that if your estimate of your total time for doing everything, putting on the items you have described for us and walking from the locker to your work station is eight to nine minutes, of that eight to nine minutes, approximately perhaps six to seven of those minutes are the time that you are actually putting on your items, fair?

A. Sounds fair.

Q. You agree with that, sir?

A. Yes.

Q. Okay. Now, three of the items that you have told us that you put on are a hard hat, the hair net, and boots, correct?

A. Yes.

Q. I realize the item I am holding is not your own hard hat. You have your own hard hat at Tyson, correct?

A. Yes, sir.

[599] Q. And it is adjusted to fit your head, correct?

A. Yes.

Q. And obviously you have put that hard hat on hundreds if not thousands of times in the time you worked at the company, correct?

A. Correct.

Q. And I am holding Defendant's Exhibit 2006. Do you agree that this appears to be similar to the type of hard hat you wear with an adjustable strap in it?

A. Yes.

Q. Okay. Now, I am not going to ask you to put it on, Mr. Lovan, but can we agree that in terms of the time it takes you to put your hard hat on, we are talking two seconds, couple seconds. Do you agree with that?

A. Yeah, just slip it on.

Q. Okay.

A. And there's an earplug, you have to, you know—

Q. You have them strapped in your helmet?

A. Yes.

Q. They are already hanging there and you put your earplugs in?

A. Yes.

Q. That's a couple seconds, can we agree? You put on your hair net, something similar to what I am holding here?

A. Yes.

[600] Q. Correct? Defendant's Exhibit 2003 is an example. It just has an elastic fold on it and you put it on your head, right?

A. Yes, just—yeah, cover everything, you know.

Q. And we can agree that just takes two seconds or so, fair?

A. Yes.

Q. Okay. Are the boots that you put on boots issued by Tyson?

A. Yes, rubber boots.

Q. I am holding in my hand a sample, these are marked I think Defendant's Exhibit 2011, rubber steel-toed boots. Are these similar to the boots you put on every day?

A. Yes, sir.

Q. And can we agree that putting on your boots takes perhaps 10 seconds?

A. You know, sometime I have to put the socks on, my socks and take my tennis shoes off and put the—yeah—the boots in, you know, it seems a little bit longer.

Q. Not more than 30 seconds, can we agree with that?

A. Okay. Yes.

Q. All right. So in terms of the items I just reviewed, just the hard hat, the hair net, the earplugs, and your boots, those—to put those on takes well under one minute, doesn't it?

[601] A. Yeah, pretty close.

Q. So out of the six or—six to eight minutes that are actually involved in putting on your equipment or your items in the locker room, less than a minute of that is the hard hat, hair net, earplugs, and boots, the rest of it is then the protective items and your frock, is that fair?

A. My frock, yes.

Q. Okay. Now, you were asked about your lunch break. Do you remember that?

A. Yes, sir.

Q. Now, at your lunch break you have told us you take off everything except your hard hat, your hair net, and your boots, that's correct?

A. Correct.

Q. And then you go to lunch?

A. Yes, sir.

Q. And then when you come back to lunch—from lunch rather, you put all of your items back on, that is your mesh sleeve, your mesh glove, your two cotton gloves, your rubber glove, your frock, your belly guard, your Kevlar sleeve?

A. Yes, sir.

Q. And your knife belt with your knives?

A. Yes, sir.

Q. All of those items, correct?

A. Correct.

[602] Q. And yesterday you were asked by your lawyer how long it takes you to put the items back on after you come back from lunch and your testimony was that it takes you approximately two minutes.

A. Yes, sir.

Q. Can you explain for me, Mr. Lovan, how it takes you six to seven minutes to put on the same items before your shift that you put on in two minutes after you come back from lunch?

MR. DOOLITTLE: Objection, Your Honor. That mischaracterizes his testimony. That is not what he said.

THE COURT: Overruled. Answer the question, sir.

BY MR. SAPP:

Q. Do you remember the question, Mr. Lovan?

A. The reason, you know, I have my boots and everything on before and then there's a crowded, you know, when people come back from the lunch at the same time and then it kind of take you more time to grab stuff because the hook is side by side, about six inches apart, so you grab one thing and put it on and then another person grab their stuff so it slow you down.

Q. And that—but I think we understand each other, but even with that, you told us yesterday you put everything back on after lunch in two minutes, right?

A. Yes, sir.

Q. And because we've eliminated the hair net, hard hat, and the boots as we have already discussed, you told me earlier [603] it takes you six to seven minutes to put all those things on at the beginning of your shift, right?

A. Right. Another thing, when, you know, I taking off the stuff too, it might slow me down too because of the crowded, a lot of people.

Q. At lunch?

A. Yes.

Q. Within that two minutes, correct?

A. Yeah.

Q. Okay. Mr. Lovan, the reason I ask that is if, in fact, you put on the items that we've described, your mesh sleeve, your mesh gloves, all your gloves, your Kevlar, your frock, in two minutes, is it fair that one of the reasons it might take you six to seven minutes to put those on at the beginning of your shift is Tyson has no rule, does it, that requires you to put your items on in a particular time in the locker room in the morning, does it?

A. No rule.

Q. There's no one in the locker room monitoring you and saying Nicolas, you must put on these items in two and a half minutes or anything like that, is there?

A. No.

Q. You can put on the items that you wear at your job in whatever time you feel it needs to put them on correctly, right?

A. Yes, as long as I get to the work station on time.

[604] Q. Exactly. And you can put on your items in any order you want to put them on, correct, there's no rule about what you have to put on first, is there?

A. No, no rule.

* * * *

[605] Q. Now, you have described for the jury and for me the items that you put on in addition to the hard hat, the hair net, the earplugs, and your boots. I want to just follow up on a couple questions in that regard.

First of all, I would like to establish, Mr. Lovan, you have told the jury your position is classified as a utility person, correct?

[606] A. On the ham line, yes.

Q. On the ham line. The job that you have done most often, however, in the ham line is what is called bone hams, correct?

A. Yes, sir.

Q. And the bone hams job that you do most often is a position in which you use a knife, true?

A. Yes, sir.

Q. Is that correct? And you have told us yesterday I think I heard you say that all of the items that you described, you wear a mesh sleeve, correct?

A. Yes.

Q. A Kevlar sleeve?

A. Yes, sir.

Q. On your right arm?

A. On my right arm.

Q. Yes. A mesh glove, correct?

A. Mesh glove.

Q. On your left hand?

A. On my left.

Q. You wear two cotton gloves?

A. Yes.

Q. You wear one rubber glove or two?

A. Two rubber gloves.

Q. Two rubber gloves. Your frock?

[607] A. Yes, sir.

Q. A belly guard?

A. Yes.

Q. And a knife scabbard or chain with your scabbard—excuse me, with your knives and your steel on them, correct?

A. Correct.

Q. All right. And I think I heard you say yesterday, I want to clarify, do you—is it your testimony that all of the items you describe are required for your job?

A. Yes, sir.

Q. Have you ever seen or did anyone review with you when you started your work at Tyson what is called a JSA, a Job Safety Analysis that goes over the equipment you are required to wear for your position?

A. They never show me when I start this position.

Q. Have you ever seen the JSA for your position?

A. I never have.

Q. Has it been your observation, sir, that in all the years that you have worked at this plant, and particularly the last few years that you have worked for Tyson, that there are a lot of production workers who may wear items for comfort or convenience that are not required by their position? Do you agree with that?

A. Yes.

MR. SAPP: At this point, Your Honor, I would like to [608] move into evidence, it is a Plaintiffs' exhibit, it is Plaintiffs' Exhibit 239-36 and any Defendant objection that was made to that exhibit is withdrawn. It is the JSA for the bone hams position of Mr. Lovan.

MR. DOOLITTLE: Your Honor, to the extent that—we would object to the extent that the witness has testified he's never seen such a document and this document reflects no signature, just a blank sheet of paper, he has already testified he's never seen this document, no one has ever presented him with this document, and obviously he has no knowledge of it. It is not his document. It has not been presented to him and bears no signature.

MR. SAPP: It is a Plaintiffs' exhibit, Your Honor.

THE COURT: 239-36 is received. The question concerning personal knowledge is a different question.

MR. DOOLITTLE: Thank you.

BY MR. SAPP:

Q. Mr. Lovan, if you think back, isn't it correct on your knife hand at least you are not required to wear a cotton glove or rubber glove on your knife hand?

A. No, not required.

Q. But you choose to wear a cotton glove and a rubber glove on your knife hand, correct?

A. I choose to wear because of sanitation and to get me a good grip for the knife handle.

[609] Q. The—to clarify, I think it is obvious, the items that you have described as the belly guard and your knife belt and scabbard, I think the jury knows this, but we don't have it for security reasons in the courthouse, your knife belt is a chain that goes around your waist and has a simple fastener on it, correct?

A. Yes, it go around.

Q. And that's something that you have taken on and put—taken off and put on hundreds of if not thousands of times, correct?

A. Yes, sir.

Q. And it is fair to say that item, it takes you one to two seconds to take that belt off and put it on, correct?

A. Approximately, yes, sir.

Q. And I think we have the belly guard.

MR. SAPP: Do you have the belly guard?

Q. The belly guard which is already in evidence is Plaintiffs' Exhibit 322. I just want to—you do agree that the strap on this belly guard and this plastic clip that clips in and out, correct?

A. Yes, it snap in.

Q. The way you put it on is you put the clip in front, snap it, it is on, and you turn it around so the belly guard covers your front, correct?

A. Yes.

[610] Q. We can agree to do that takes just a few seconds, doesn't it?

A. Yes.

Q. And you talked about dipping after your shift and before your shift. You carry your knife belt and your scabbard and your belly guard on your shoulder or your arm and you just dip it in the tank, that's what dipping is, that takes a second or two, is that fair?

A. Just to dip in the tank, yes.

Q. And you can put your belly guard on and your knife chain belt, you can fasten those as you continue to walk to your station, correct?

A. I prefer not to do that.

Q. You do it when you get to your station?

A. I do it to my station.

Q. Okay. Thank you. Now, the bone hams position that we talked about is not the only position that you have performed in the ham line, correct?

A. Yes, sir.

Q. You do some other jobs there, right?

A. Yes, sir.

Q. And one of the jobs you do is membrane skinner, is that correct?

A. Correct.

Q. As a membrane skinner you don't use a knife, correct?

[611] A. I don't use a knife.

Q. Do you wear a different combination of items when you do the membrane skinner job where you don't use a knife?

A. Yes.

Q. So some of the protective equipment that you wear when you do your bone hams job you don't wear when you do the membrane skinner job, right?

A. Right.

Q. So based on even in your own personal situation, Mr. Lovan, it is fair to say that different positions within the ham line call for different combination of safety or sanitary items depending on the position. Do you agree with that?

A. Yes.

Q. Okay. And that's been your observation of other persons that you have seen over the years working in your department, true, they wear different combinations of items depending on their job?

A. Yes, sir.

Q. All right. Did I—to clarify one thing, Mr. Lovan, when you were talking yesterday about what you put on in the locker room at the beginning of your shift and the order in which you put those things on, you put on the frock after you had already put on the mesh sleeve, the Kevlar arm guard, correct, you put the frock on after those, don't you?

A. I put the frock on after the—I put the mesh sleeve [612] on and the Kevlar sleeve on.

Q. The frock covers the mesh is my point, correct?

A. Yes.

Q. And as a result of the fact that the frock covers the mesh, you don't have to wash the mesh after your shift, do you, you just put it in the laundry bag?

A. Yes, put on the laundry—my mesh I don't put in the laundry bag. I just hang it.

Q. You just hang it without washing it because it is under the frock?

A. Yeah.

* * * *

[613] Q. In your own observation, Mr. Lovan, because you have been there at the plant so long, it is fair to say from your own observation that different employees put on their items and take them off at different speeds than other employees, don't they?

A. Yes, sir.

Q. All right. And to your knowledge there is no rule at [614] Tyson that requires you to put on any one of your items in any specific time, is there?

A. No.

* * * *

[615] Q. Okay. And to clarify, you talked with your counsel about the end of your shift. At the end of your shift as utility man, you wash off your equipment with one of the 50 hoses that you have told us about, correct?

A. Correct.

Q. Those are fairly high-power hoses, correct?

A. Correct.

Q. And you carry your knife and your scabbard and your steel on the knife chain and you spray that, correct?

A. Correct.

Q. And your belly guard that we have talked about, you unclip that and you spray that with the hose, is that correct?

A. Belly guard, yes.

Q. Okay. And then you told us it takes about 30 seconds to walk from your work station to that washroom, correct?

A. Correct.

Q. And I think we agreed earlier based on the time that you took to walk from the locker to your work station, the [616] remainder of your walk to the locker room would be less than a minute, wouldn't it?

A. From the—

Q. From the wash station to the locker room, isn't it?

A. About a minute or so, yes.

MR. DOOLITTLE: I'm sorry, I didn't hear the witness.

THE COURT: What was your answer, sir?

THE WITNESS: Yes, about a minute or so to walk from the dip tank to the locker.

BY MR. SAPP:

Q. I didn't want to leave out anything, you dip your items on the way off the floor as well, correct?

A. Yes, sir.

Q. That's just the one or two second dip in the dip tank is what we are talking about there, correct?

A. Yes, sir.

* * * *

[624] Q. At the lunch break—strike that. In the morning when you get there, what do you have on when you walk in the locker room? Do you have any of your equipment on when you walk in the locker room that morning?

A. I don't have.

Q. You've got your clothes and your tennis shoes?

A. Yes, sir.

Q. And where is this equipment stored? What do you have to do? Tell the jury again what you have to do in the morning when you get to your locker.

A. All my equipment is stored in the locker and then I have to get everything out from the locker and put it on.

Q. Okay. As a matter of fact, there's a lock on the locker that you have to unlock before you can even get to it, is that not right?

A. Right.

Q. Okay. Is the locker room crowded in the morning?

A. Yes, it's crowded.

Q. Are you the only person in that locker room?

[625] A. No, sir.

Q. Do you ever have to wait for a place to sit down?

A. Yes, sir.

Q. And at lunch you don't take off your boots?

A. No, sir.

Q. You don't take off your tennis shoes?

A. No, sir.

Q. You don't change socks?

A. No, sir.

Q. You don't do any of that at lunch?

MR. SAPP: Your Honor, this is leading and suggestive.

MR. DOOLITTLE: It is leading. I withdraw the question.

Q. Do you take off any of that stuff at lunch? Do you take your boots off at lunch?

A. No, sir.

Q. Do you change socks at lunch?

A. No, sir.

* * * *

[629] JESUS C. BALDERAS,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

THE COURT: When you are comfortably seated there, make sure the microphone is pulled fairly close to your mouth there. Thank you.

EXAMINATION

BY MR. SMITH:

Q. Good morning, Mr. Balderas.

A. Good morning.

Q. Can you please state your name for the record?

A. Jesus C. Balderas.

[630] Q. Sir, where do you live?

A. I live in Storm Lake, Iowa.

Q. Are you currently employed?

A. That's correct.

Q. Who is your current employer, sir?

A. Tyson Fresh Meats.

Q. And where do you work, what city do you work for Tyson in?

A. That's in Storm Lake, Iowa.

* * * *

[632] Q. For the jury, can you briefly describe your job duties as the shoulder chop—in the shoulder chop position?

A. I cut the—I align the carcass and there's a laser light which I pull—either pull or push the hog to be separated from the carcass from the shoulder and that is called—it goes through a saw, circular saw to separate the carcass from the shoulder like I said.

Q. In your position on your shift, okay, are there any other employees performing that same job that you are aware of?

A. No, sir, I'm the only one.

Q. In terms of the shoulder chop position, are you required to wear any personal protective equipment?

A. Yes, I do.

Q. In terms of the shoulder chop position, are you required to wear any sanitary items?

A. That's correct.

[633] Q. In your position can you please tell the jury the items of personal protective equipment and the sanitary items that you are required to wear?

A. That's correct. That would be rubber boots with steel toe, weight belt, hard hat, earplugs, safety glasses,

hair net and beard net, Kevlar sleeves, belly guard, frock, plastic and cotton gloves.

Q. With respect to the belly guard, have you worn that a long time?

A. I began the use of belly guard I would say for a year and a half.

Q. And what did you wear, if anything, prior to wearing the belly guard?

A. I used to wear an apron, a plastic apron.

Q. And why did you change?

A. There's a metal finger right where I work and it was—it was bothering me on one side of my leg and I change from the apron to a belly—a belly guard because of that.

Q. Was that permitted by the company?

A. Yes, it was.

Q. Now, how long have you worn safety glasses?

A. I have worn safety glasses for I would say like a year—a year and a half.

Q. Why did you start wearing safety glasses?

A. I start wearing the safety glasses because I got some [634] kind of an infection in my eye. I probably got a piece of fat or a chip of bone into my left eye and I got an infection. They told me that I should start wearing safety glasses.

Q. Who told you that?

A. They took me to the office and say well, what was the problem, and I said I probably got something

in my eye and the safety person along with my supervisor, they would agree that I should start wearing safety glasses from now on.

Q. You mentioned Kevlar sleeves. Do you wear a Kevlar sleeve on both arms or one arm?

A. That's correct, on both arms.

Q. On both arms? I didn't hear the answer.

A. Both arms, that's correct.

Q. Thank you. Do you recall who told you that you were required to wear the personal protective equipment and sanitary items in the shoulder chop position?

A. There's—before you start doing a job they have a paper that they go through, they start telling you what are the items required to do that job and that's where it says you have to use certain items.

* * * *

[638] Q. Okay. So you arrive at your locker and what is the first thing that you do, sir?

A. I open up my locker and I start dressing up.

Q. Okay. Now, I want to talk about this process of dressing up. Can you describe for the jury the order in which you put on your personal protective equipment and sanitary items and the first thing you do to the last thing that you do?

A. Okay. I get to my locker, open it up, I start—I put my boots first, then I put my weight belt, then I put my sweater on. After that I wear bandana around my head, I put my beard net, hair net, my hard hat, safety glasses, and then I open up my laundry bag and I put my frock, my Kevlar sleeves, after that I put my

gloves, plastic and cotton gloves inside my pockets, grab my belly guard, and that's about it.

Q. As part of this lawsuit are you claiming pay for the sweater or the bandana that you put on?

A. No.

Q. Okay. Are those items that you could put on at home?

A. Yes, sir.

Q. And why do you wear a sweater to work or at work rather?

A. Since I work in the cold side of the plant, I must [639] wear a sweater.

Q. Once you have completed the process that you just described, what do you do next after you get your equipment on?

A. I go and if—I go to the cafeteria and wait for the time.

Q. Okay. What do you do in the cafeteria?

A. Well, I sit there until they open up the doors to go in there.

Q. How long do you typically spend in the cafeteria before you go to work or your work station rather?

A. I would say around seven minutes.

Q. Okay. Now, when you leave the cafeteria, where do you go?

A. I go straight and sanitize my hands—punch in first, sanitize my hands, and then go to the washroom.

Q. And the punch clock that you punch in, where is that located?

A. It is located in the cafeteria.

Q. Okay. And where is the wash station located?

A. It's located next to the cafeteria on your way—on your way in to the cut floor.

Q. Okay. And what items, it any, do you dip?

A. I only dip belly guard.

Q. On a typical day when you're dipping the belly guard, are there any other employees doing similar activities?

[640] A. Yes, sir.

Q. On a typical day can you approximate how many other employees are dipping items?

A. Well, all of them. You mean ahead of me?

Q. Yeah, how many—how many employees typically are ahead of you in line?

A. Probably three or four.

Q. Okay. Approximately how long before the first piece of meat arrives in your work station do you get to your work station?

A. I get there around three minutes before the first piece comes.

Q. Okay. Now, during those three minutes do you do anything?

A. I have to start on the saw, open up water, and check, see if the light where I—the laser light where I align the carcass is in the right place. That's the supervisor's job, but I just want to make sure it's in place. There's some metal sheets that cover the table and I need to make sure that they're in place also.

Q. At this point do you have anything on your hands?

A. After doing that I put my cotton and plastic gloves on.

Q. And at this point have you put on your belly guard?

A. That's correct.

[641] Q. When do you put on your belly guard?

A. What was that again?

Q. When do you put on your belly guard?

A. Before the first piece comes.

Q. Okay. Now, the process that you just described, you arrive at your locker, putting on your equipment, going to the cafeteria, then going to your work station, have there been occasions when you have not gone to the cafeteria?

A. Well, of course. Yes. There have been occasions.

Q. All right. And under what circumstances would you not go to the cafeteria?

A. Sometimes I run late, sometimes I think I am going to be late to the line.

Q. Does the line start if you are late, whether or not you are there?

A. Well, it starts, yeah.

Q. Okay. Now, on those occasions when you don't go to the cafeteria, the process of opening your locker, putting on your equipment, walking to the floor, sanitizing your hands, dipping your belly guard, and arriving at your work station, can you approximate for the jury how long that process takes you?

A. I would estimate around 10 to 12 minutes.

Q. And what is your estimate based upon?

A. I mean, I been doing this for 12 years already. I think that that would be my best estimate.

* * * *

[645] Q. Now, once the last piece of meat has come by your station, what is the first thing that you do at the end of the day?

A. At the end of the day when the last piece goes by I make sure the saw is off along with the water, I go straight to the washroom.

Q. Now, how far is your work station from the washroom?

A. Exactly I don't know, but it's about—I would say around 30 yards from my work area.

Q. Okay. And approximately how long does it take you then to walk from your work station to the wash area?

A. I will say around 30 to 40 seconds.

Q. Okay. Typically are there other people there when you arrive at the washroom?

A. Yes, they are.

Q. Okay. And what happens if you're not the first person there to wash your equipment?

A. I have to wait.

Q. Okay. When it is your turn, what is the first thing that you do?

A. I wash my boots with soap, water.

Q. What is the next thing that you do?

A. I wash my belly guard, my glove, plastic gloves, also my hard hat.

Q. Do you wash your hard hat every day?

[646] A. Not every day, but every two or three days I do.

Q. Approximately how long does that process of cleaning those items take you?

A. I will say around two to three minutes.

* * * *

[647] Q. Now, after you have completed washing your equipment, what do you do next?

A. I go to—I go punch out and then go to my locker room.

Q. Okay. When you arrive at the locker room, can you describe the process of what the first thing you do is to the last thing that you do before you leave for the jury?

A. I open up my locker again, grab the laundry bag, take off my boot first, then I take my frock and—my belly guard first, my frock, Kevlar sleeves, plastic gloves, cotton gloves, then I put my beard net and hair net inside the hard hat along with my bandana and earplugs, take off my safety glasses, and that's about it.

Q. Okay. And you mention that you put some items in your laundry bag. How do you close your laundry bag?

A. We have a pin to close it.

Q. After you close the laundry bag and the items are in, where do you put the laundry bag?

A. There's a basket right in the corner of the locker room where we have to throw the laundry bags there.

Q. Okay. Once you have thrown your laundry bag in the basket, what do you do?

[648] A. I go ahead and go to the cafeteria and ready to leave.

Q. What time does the last piece of meat arrive at your work station?

A. That would be 2:30 in the afternoon.

Q. Now, the process that we just went through from the line stopping, you going to wash your equipment, punching out, going to the locker room and take off your equipment, tossing the laundry bag in the basket, can you estimate approximately how long that process takes you?

A. My best estimate would be from eight to 10 minutes.

Q. And what do you base that estimate on?

A. It's based on the time that I have done it. I mean, I have done this for years.

Q. At the end of your workday when you are taking off your equipment, do you typically stop and socialize on either the production floor or in the locker room?

A. No, I don't.

MR. SMITH: Thank you, Mr. Balderas. One of the company's attorneys is now going to ask you some questions.

THE COURT: Mr. Sapp?

EXAMINATION

BY MR. SAPP:

Q. Mr. Balderas.

A. Hi, how are you?

Q. Good morning.

[649] A. Good morning.

Q. Good to see you again.

A. Good to see you again too.

Q. I know you don't mean that, but you should. Just a few questions for you, sir. You've told your counsel and confirmed to the jury that your job is shoulder chop on the cut floor and you are the only person who does that job, am I right?

A. That's correct.

Q. And in describing the items that you wear every day for the jury, I believe in response to a question from counsel you indicated all those items were required except for your sweater and your bandana. Do you remember that?

A. That's correct.

Q. Now, you mentioned when counsel asked you a question about how do you know they were required or however it was he asked you, you said well, there was a paper when you had an orientation. Do you remember that?

A. That's correct.

Q. Have you heard of the term JSA or Job Safety Analysis that lists the required equipment for each position at Tyson?

A. That's correct.

MR. SAPP: Your Honor, I believe this is in evidence already, but I want to confirm. It is a Plaintiffs' exhibit, it is Plaintiffs' Exhibit 71, the JSA for the shoulder chop position in department 721.

[650] THE COURT: Is it in?

MR. MUELLER: It is an A exhibit.

THE COURT: Category A exhibit, it is received. It is not already in.

MR. SAPP: Would you publish it?

Q. Mr. Balderas, if you look on your screen there, sir, to your right.

A. Sorry about that.

Q. That's okay. I can't figure them out either. Can you read that okay, sir?

A. That's correct.

Q. All right. And just to cover a couple quick things, at the top this says Storm Lake, Job, Shoulder Chop, and it gives a number and the department number, correct?

A. That's correct, sir.

Q. This is your job?

A. That's correct, sir.

Q. And do you see where it says Safety Equipment Required?

A. That's correct.

Q. And it has Hard Hat and that's checked, correct?

A. That's correct.

Q. And it has Earplugs or Muffs and that's checked?

A. That's correct.

Q. And then it has Safety Glasses and that's checked, [651] correct?

A. Correct.

Q. Do you see anywhere under safety items required Kevlar sleeve?

A. No, I don't, sir.

Q. You choose to wear a Kevlar sleeve, correct?

A. That's correct.

Q. It is possible under Storm Lake's policies, Tyson's policies, if you want to wear something that is safety related, you are free to wear that even if it is not on your job safety required equipment. Do you agree with that?

A. That's correct, sir.

Q. Okay.

MR. SAPP: Your Honor, I want to clarify and present another exhibit, it is not yet marked, it is technically for impeachment purposes, if I may. I am going to show a copy to counsel and I am going to have the witness describe it before asking to move its admission and show it to the jury.

THE COURT: Okay.

MR. SAPP: May I approach, Your Honor?

THE COURT: Yes. You don't have to ask permission.

BY MR. SAPP:

Q. Mr. Balderas, I am going to hand you another exhibit. I have had it marked Defendant's 2253 at the bottom. Before I move for its admission, I will ask you to identify it. Does [652] this also say at the top it is a Shoulder Chop Job Safety Analysis just like the one we just looked at?

A. That's correct.

Q. This one though which is a Defendant's exhibit, down at the bottom this actually has your signature on it at the bottom, doesn't it?

A. That's correct.

Q. Okay. And at the top, I won't ask you to read the items yet, in looking at the three items that are checked at the top, this has an additional item that wasn't on the last one, doesn't it?

A. That's correct.

MR. SAPP: Your Honor, I move the admission of Defendant's Exhibit 2253 and we will also state for the record the original will show there's a blanked out area which contains some personal identifying information of the witness and it is blanked out so we aren't in violation of any rules of the court.

MR. SMITH: No objection.

THE COURT: Received.

MR. SAPP: Can we publish this?

Q. I am going to give—I am going to switch copies with you, Mr. Balderas, because this one—I blanked out your Social Security number for you. Okay? I don't want to put that in the public record.

Now, I have displayed up on the screen there a copy of [653] this Exhibit 2253 and I just want to clarify for the jury. This is the—a similar document as we have already described, correct?

A. Correct.

Q. I am going to move this up and show the jury. This one contains your signature there at the bottom left, doesn't it?

A. That's correct.

Q. And this one actually has some other signatures, the safety director, shows others that reviewed this by their signatures, correct?

A. Correct.

Q. And dates, correct?

A. Correct.

Q. This one at the top shows one more item that did get added and that's the weight belt, correct?

A. Correct.

Q. And there is no belly guard listed on this required equipment, correct?

A. That's correct.

Q. But in fairness you have explained to the jury why you now choose to wear a belly guard, that you developed a little irritation on one side of your leg because of your work table, is that correct?

A. That's correct.

[654] Q. All right. And no one at Tyson prevents you from wearing an additional item for your comfort or convenience just because it is not listed on the JSA, do they? Do you agree with that?

A. Yeah, I agree.

Q. All right. Thank you, sir. I am done with that. I will take that back from you. Mr. Balderas, you have been asked by your counsel to give some time estimates concerning the time it takes you to put on things, take things off, correct?

A. Correct.

Q. And these are questions you have been asked before in this case, correct—

A. Correct.

Q. —to give estimates. And first of all, we can agree the estimates that you have given are just that, they are your best estimates, correct?

A. Correct.

Q. You have never timed any of the activities you have been asked about, have you?

A. I have never timed myself.

Q. It is just your best effort to estimate the time, correct?

A. Correct.

Q. And I am not being critical, I am just asking this question: Do you think, Mr. Balderas, it is possible when you [655] were asked a question without being actually there and putting it on, you may have overestimated the time of putting on some of your items?

A. No, I don't.

Q. Let me give you an example. I am holding up in front of the jury Defendant's Exhibit 2006, it is a Tyson hard hat. Do you see that?

A. Yes, sir.

Q. And this is—I am happy to have you look at it, this is like the hard hat you wear every day at your job, isn't it?

A. That's correct.

Q. It has an adjustable strap inside, correct?

A. Correct.

Q. Obviously the hard hat you have, it may belong to the company technically, but it is your hard hat to wear, you own it, don't you have?

A. Yes, sir, I do.

Q. Your hard hat is adjusted to fit your head over your bandana and that is something you control, right?

A. That's correct.

Q. Now, having—looking at the hard hat that I am now holding, if I asked you, Mr. Balderas, how long do you think it takes you to put on the hard hat, would you agree you can put this hard hat on in two or three seconds, would that be fair?

A. That would be fair, that's right.

[656] Q. Okay. Maybe five, but definitely less than 10 seconds?

A. Sometimes the strap goes all the way up and you have to adjust it; but that's sometimes.

Q. But just a few seconds?

A. A few seconds probably, yeah.

Q. Now, do you agree when you were asked at your deposition how long you thought it took and how long you estimated it took to put on your hard hat, you stated at that time you thought it was 30 seconds?

A. I said that, yeah.

Q. I am not being critical, but just now that you see the hard hat and think about it and look at what is involved in putting it on, 30 seconds was probably a pretty high estimate, wasn't it?

A. I consider taking it out of the locker room, out of the locker, I was—that's what I meant by 30 seconds, taking it out of the locker, putting it on, adjust it, I would say 30 seconds, sir.

Q. One of the other items that you have been asked about is steel-toed boots, correct?

A. That's correct.

Q. And I know there are different kinds, but I am holding in my hand what the jury has seen before already, it is a pair of boots that's marked Defendant's Exhibit 2011. I will hold [657] them out in front of you, rubber boots, steel toes, are those like the boots you put on every day?

A. Those are exactly the boots that I wear.

Q. They have no straps, no buckles, no ties, they just slip onto your feet?

A. Yes they do.

Q. I am not going to have you do it here, but looking at the boots, would you agree probably to put on these two boots would take you 30 seconds or less?

A. To put them on it takes—yeah, more time considering that you have to sit, fold your pants, fixing them, and put them on.

Q. But it takes less than 60 seconds, can we agree with that?

A. I will say more than that.

Q. You testified at your deposition that you believed that it takes you three minutes to put on your boots?

A. I said I would think two minutes and a half to three minutes, yeah.

Q. You don't think a three-minute estimate is way too high for putting on a pair of boots?

A. Like I couldn't—I have to take them out of the locker, sit myself down, fold my pants, and put the boots on.

Q. You wear a hair net and a beard net, correct?

A. That's correct.

[658] Q. Yours may be larger because you have a beard, but it is something like I am holding in my hand here, isn't it, Defendant's Exhibit 2003?

A. That is exactly what I wear, that's correct.

Q. You agree you can put your hair net and beard net on in less than 10 seconds?

A. I would say more than that.

Q. 20 seconds?

A. Probably 20 seconds, that's correct.

Q. In any event, at your deposition did you tell us you thought it would take you one minute to put on your hair net?

A. I would—did I say that one minute? That would take me 40 to a minute, yeah.

Q. So you don't think one minute is a little too high on your estimate to put on a hair net?

A. Well, you have to put that beard net—you have to adjust the beard net right to the mouth. You don't

want to have it all over your nose and your cheeks and whatever. You have to adjust it to your face and then you have to cover your ears, cover your bandana with the hair net, and I would say that would take a minute or it could be 40 seconds. Like I said, I haven't timed myself, but that's my best estimate.

Q. One of the items that you have—the jury is already aware that you and everyone wears is a frock, a white coat that goes over your clothing, correct?

[659] A. Correct.

Q. This is one of the items that you take out of your laundry bag when you start to dress in the morning, isn't it?

A. That's correct.

Q. The company launders this frock for you every night, you have a clean frock to put on over your outer clothing every morning, don't you?

A. That's correct.

Q. And one of the steps that you have talked about in answering your counsel's question is that you have to take the frock, the items out of your laundry bag, correct?

A. Correct.

Q. Now, to take your frock out of your laundry bag to get ready to put it on, can we agree that would be 10 seconds?

A. To take it out of the bag?

Q. Yes.

A. Just to take it out of the bag?

Q. Yes.

A. That would be around, yeah, 10 seconds, 15 seconds.

Q. And again, I am not being critical, I am just trying to get to how certain you are of your estimates that you base your claims on in this case, sir. Did you tell me at your deposition that you thought it took you three minutes to take your frock out of your laundry bag? Do you remember that?

A. I didn't say to take it out of the laundry bag. That [660] means take it out of the laundry bag and putting it on.

Q. Okay. Do you recall—

MR. SAPP: Counsel, this is page 31, lines 24 and 25 and the top of page 32.

Q. Let me ask you, Mr. Balderas, if you remember being asked this question and giving this answer and I will be happy to show it to you, sir.

A. Okay.

Q. Question, "How long do you think it takes you to take the frock out of the laundry bag?" Answer, "I would say taking it down from the hanger and opening it up and taking it out, I would say around three minutes."

Question, "Three minutes?" Answer, "Yeah."

Do you remember giving that answer?

A. That's correct.

Q. Do you still believe it takes you three minutes now that we've focused on it to take the frock out of the laundry bag?

A. No, sir.

Q. I am not going to go through all the items, Mr. Balderas. I am simply trying to see if we can agree that when you're asked to estimate time in the abstract like at a deposition, it is very possible that your time estimates can be high, would you agree with that?

A. I agree with that.

* * * *

[668] DONALD BROWN,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

MR. DOOLITTLE: May I inquire, Your Honor?

THE COURT: Yes. Go ahead.

EXAMINATION

BY MR. DOOLITTLE:

Q. Would you introduce yourself to the jury, please?

[669] A. Donald Brown.

* * * *

Q. Where are you currently employed?

A. Tyson Foods in Storm Lake.

Q. And can you tell the jury when you went to work there approximately?

A. 5-20 of '08.

Q. Does that come up to about three and a half years?

A. Yeah, three and a half.

Q. Prior to going to work at—at the Storm Lake facility, Tyson Foods, have you worked in the meat packing industry before?

A. Yes.

Q. About how long have you worked in this industry?

A. About 30 years.

Q. Could you just describe some of the jobs that you have worked in so the jury will know your background?

[670] A. Sanitation, production, on the kill floors, manifester on the loading dock, variable jobs throughout the plant.

Q. All right. How many jobs have you held for Tyson?

A. Just one.

Q. And I'm sorry, tell me again, what was your date of hire?

A. 5-20 '08.

Q. Okay. What was that job that you hired into in May of '08 with Tyson?

A. Split saw.

Q. And for the benefit of the jury, what is a split saw?

A. It's where you split the carcass in half.

Q. Is that vertically or horizontally?

A. Yeah, it's vertical.

Q. It is like—

A. Up and down.

Q. And what do you accomplish this with?

A. Big saw with an 18-inch blade.

Q. When you say big saw, how big is it?

A. Probably weighs about 200 pounds.

Q. 18-inch, is that a round blade or long blade?

A. Circular blade.

Q. Do you know about how fast this blade turns?

A. Just an educated guess, probably 3,000 to 4,000 RPM's.

Q. What shift do you work on?

[671] A. I work on the second shift.

Q. Is that also called the B shift?

A. Yes.

Q. Do you know if that has a department number?

A. Yes.

Q. And what is that department number?

A. 913.

Q. Okay. Now, the jury has heard for the last several days about a kill side or fab or cut side. What side of the plant is it that you work on?

A. I work on the kill side.

Q. What grade is that 913 classification?

A. My particular job is grade four.

Q. The hogs, how do these hogs get to you so that you split them? Is it a chain or a line that these hogs are on? Explain to the jury how that all works.

A. Yeah, the hogs are fed into the kill floor on chains.

Q. All right. And they come past you?

A. Yes.

Q. Okay. And at what speed, if you know, do these hogs come past you?

A. The splitters, we're doing about 17 hogs a minute.

Q. Okay. Are you required to wear any personal protective equipment or sanitary equipment? Does the company have any requirements for this particular job as a hog splitter [672] that they require you to wear?

A. Yes.

Q. And could you just list those out for the jury?

A. The splitters are required to wear steel-toed boots, uniform, white uniform, apron, cotton gloves, hard hat, hair net, earplugs.

Q. Anything else?

A. And safety glasses.

Q. All right. Now, let's talk about this hard hat. Is that required? Does Tyson require you to wear that hard hat?

A. Yes.

* * * *

[679] Q. All right. Why don't you take the jury through what your typical workday is, let them have some idea, you're the first hog splitter that's testified so they haven't heard any hog splitters testify before you. Okay? So just take them through a typical day so they will know what you do, how you make your living.

A. When I first arrive at the plant?

Q. Please, sir.

A. All right. When I first arrive at the plant, I park my car, of course, walk through security, go through the cafeteria to get to the locker room, go to my locker, unlock my locker, take my laundry bag out, take the pin off my laundry bag, remove my clothes and PPE equipment that is in there and hang it to where I've got room to put my street clothes in.

I take off my shoes, my socks, my pants, my shirt, and I hang them in the locker and then I put on my uniform, my pants, my shirt, and my work socks and my work boots and my hair net and my hard hat and I grab my—the remainder of any items and shut my locker and I go to the cafeteria to wait till five—five minutes before my shift starts.

Q. All right. You don't wear your boots because you [680] can't take them home, right?

A. No.

Q. Do you put your boots on first or do you put your—what you refer to as your whites, that's the company-furnished white pants and shirt, correct?

A. Correct.

* * * *

[681] Q. You have gone over the fact that you—okay. Let me get back to where I was. Do you put on the boots first or the whites first?

A. I put on the whites first because you can't get the pants over the boots.

Q. These are the boots right here, (Indicating) correct?

A. Correct.

Q. I am going to hand you what has been marked as D2002-2. Does this appear to be a pair of the white pants?

A. Yes.

Q. Ones you wear may be a little bigger?

A. I think so.

Q. Okay. They would for me too, Mr. Brown. So you put the white pants on and then the boots?

A. Yes.

Q. All right. And as of this point in time after putting on this ensemble that's required, have you yet to punch the clock?

A. No.

Q. All right. After you get all this on, what do you do?

[682] A. I go to the cafeteria to watch TV and rest before I start my shift.

Q. Okay. Are you on your own time at this point in time or are you on Tyson's time?

A. I'm on my own time.

Q. Okay. Approximately when do you get up, leave the cafeteria to go to your work station?

A. I try to leave five minutes prior to my shift start.

Q. All right. And what do you do when you get to your work station? Your work station is actually that saw, correct?

A. Yes.

Q. Okay. That 200-pound saw.

A. Yes.

Q. Approximately what time do you get to that work station?

A. My shift starts at 4:32 so I am up there probably about 4:26.

Q. Okay. And what do you do when you get to that—and let me ask you this. What time—what is your understanding of when your paid time starts?

A. When the hog gets to your work station.

Q. Okay. And you're there five minutes beforehand?

A. Yes.

Q. What do you do in that period of time before the hog starts getting there before your pay starts? What do you do?

[683] A. When I get up on the kill floor I finish putting on my PPE equipment and sanitation equipment, walk to my work station, make sure my lift works, make sure my saw works, and engage it by turning it on.

Q. You do all that before you get paid?

A. Yes, before the hog gets to my station.

Q. Okay. Now, you said you put on other sanitary equipment or PPE before pay time, but after you get to your station.

A. Correct.

Q. Would you tell the ladies and gentlemen of the jury what you put on?

A. When I get to my split station I put on my safety glasses, my apron, and my cotton gloves.

* * * *

[687] Q. Now, you described the events from your arrival to your workplace in the morning. Approximately how long from the time you grab your bag out of your locker until you get to your work station does that take you?

A. It takes me about four minutes to change in and it takes me—after I clock in a minute to walk up to the kill floor and to my work station.

Q. Okay. How do you know that?

A. I had timed myself.

Q. You've actually timed yourself before?

A. Yes.

Q. Okay. Now, sometime during the second shift, B shift, is a lunch break, correct?

[688] A. Correct.

Q. So if you took—let me go back. If it took you four minutes in the locker room and a minute to walk, let me ask you, it takes you a minute to walk from the clock to your work station?

A. From the locker room on up to the work station.

Q. So that's about five minutes in the morning?

A. Yes.

* * * *

[692] Q. What do you do at the end of your lunch break? What do you do?

A. At the end of my lunch break I return back up to the kill floor to get dressed back into my PPE and sanitation equipment and return to my split saw bench, engage my split saw and my lift station.

Q. And do you have to do that before the first hog arrives?

A. Yes.

Q. All right. And let's talk about the time then on your lunch hour—not an hour, on your lunch break. How long does it take you to wash up this—this five or six pounds of caked-up matter at the beginning of your lunch break? How long does that take?

A. From walking from my work station to the wash stall, two minutes.

Q. And how long does it take to walk from the wash stall to the cafeteria?

A. Another minute.

Q. Okay. And when you come back, how long does it take you to put it back on and get to your—from the time you leave the cafeteria till you put it back on to get to your work station, how long does that take?

[693] A. Minute and a half.

Q. So how long are you spending on these activities during your lunch hour?

A. After lunch, four and a half minutes.

Q. Are you paid for that time?

A. No.

* * * *

[695] Q. So at the end of the day—what time did you say the last hog is normally past your station?

A. Anywhere from 15 to 1:00 to one o'clock.

Q. A.m., in the morning?

A. Are you talking about starting shift?

[696] Q. End of shift.

A. End of shift, that's at p.m.

Q. And what do you do then? What are you required to do by Tyson before you can do like anybody else at the end of the day, get in your car and leave, what are you required to do?

A. Well, I have to disarm my saw and my work station, my split saw bench, and then I proceed to the wash stall to wash up my PPE and sanitation equipment.

Q. Okay. And when does your pay stop?

A. My pay stops when the last hog gets to my station.

Q. Okay. So after—after your pay stops, is that when you start disarming your saw?

A. Yes.

Q. Okay. Well, about how long does it take you from the time you disarm your saw till you walk to the work station? Wash station, I'm sorry.

A. It's probably a minute.

Q. Okay. You are not paid for that, are you?

A. No.

Q. Okay. You get to the wash station, what do you do?

A. Wash my hard hat, apron, boots, sometimes scrub them at the end of the shift because of the protein buildup.

Q. Are you still wearing the same apron all day, right?

A. Yes.

Q. Or does the—does the company expect you to get a [697] new one every day or do they expect you to maintain it?

A. They expect you to maintain it.

Q. You don't throw—roll this up and throw it in the garbage at the end of the day, do you?

A. No.

Q. How long does it take you to wash that apron at the end of the day after you cut up in half whatever many hundred hogs?

A. It probably takes, you know, a minute.

Q. Okay. And what do you do—how do you do that?

A. With a wash-off hose.

Q. And is that the 140-degree water hose you talked about?

A. 120.

Q. 120. What else do you have to wash off?

A. Hard hat, boots.

Q. What else?

A. My arms and hands because I get heavily soiled as well.

Q. And how long does it take you after you washed up—well, first of all, you have to disengage your saw, correct?

A. Yes.

Q. Let's talk about that time too because you're not getting paid for that time. From the time you—

MS. BURKHARDT: Objection, Your Honor.

[698] THE COURT: Sustained. We don't need the commentary and you know that's disputed too.

MR. DOOLITTLE: I apologize, Your Honor.

Q. From the time you disengage your saw until you finish washing and walk to the locker room and change and place your laundry bag, the one you removed that morning, in the dirty clothes hamper, how much time does that normally take you in the afternoon?

A. At end of shift it takes about eight to nine minutes.

Q. Okay. Are you required to put that dirty bag in the hamper?

A. Yes.

Q. Are you required to do that before you walk out the door to leave?

A. Yes.

Q. Is that about 18 minutes for the day that you are not paid for?

A. 17, 18, yes.

* * * *

[700] Q. Mr. Doolittle asked you earlier if—how you knew how long it took you to walk certain distances and you said that you had timed yourself. Do you recall that testimony?

A. Yes, but it wasn't the walking time. It was the change in, change out time in the locker room.

Q. And you testified in your deposition that you had never timed the walking?

A. At Tyson's I hadn't. At Farmland I did.

Q. And you testified in your deposition that you had never timed the clothes changing time at Tyson, isn't that right?

A. Correct.

[701] Q. So the only place you ever timed clothes changing time was at Farmland Foods?

A. Correct.

Q. And the walking time you testified in your deposition you've never timed, isn't that right?

A. Correct.

Q. So when Mr. Doolittle asked you that question, I saw you hesitate, you actually haven't timed that walking time, have you?

A. The walking time was an educated guess. It wasn't included in the change in, change out time, it is just something that you do on a daily basis that you somewhat know within seconds of what you're doing.

Q. I understand, but—

MR. DOOLITTLE: I am sorry. I think that it is a mischaracterization. I asked him if he timed himself at the locker. I didn't—

THE COURT: Overruled. He can answer the question if he thinks it is something different Go ahead.

BY MS BURKHARDT:

Q. When Mr. Doolittle asked you about the walk time and you said you timed yourself, you were mistaken about that, right?

A. I was thinking he was referring just to the locker room.

[702] Q. Now, I also want to ask you, this rubber apron, the rubber apron that Mr. Doolittle asked you a lot of questions about, made a big deal about, asked you a lot of questions?

A. Yes, I do.

Q. You are not required to wear this apron, are you?

A. As far as I know through orientation, no.

Q. There are other employees who do your job who don't wear the rubber apron, isn't that right?

A. I believe there's probably on A shift. I don't see them.

Q. You testified in your deposition, did you not, that there are other employees who do your job who don't wear this rubber apron?

A. Right Foremen come up there sometimes and don't use it either.

Q. Okay. Fair enough; but other people who do your job don't wear this—

MR. DOOLITTLE: Your Honor, he is trying to finish his answer.

THE COURT: No, he finished. Go ahead.

BY MS BURKHARDT:

Q. But did you—you testified in your deposition not about foremen, you testified there are other people who do your job who don't wear this rubber apron, isn't that right?

A. Right. There's a lot of people in the plant that [703] break the rules and regulations

Q. Have you ever seen anybody tell those people that they have to wear their rubber apron?

A. I am not privy to that information.

Q. Okay.

A. I'm hourly.

Q. So there are people who you see on a day-to-day basis who aren't wearing the rubber apron doing your job?

MR. DOOLITTLE: Lack of personal knowledge.

THE COURT: Overruled. Answer the question.

THE WITNESS: Yes.

* * * *

[706] Q. Mr. Doolittle asked you some questions about your day-to-day work routine. One of the things he asked you about was what you did after you went and got dressed in the locker room and I think you said you go and sit in the cafeteria and watch TV, is that right?

A. Yes, I did.

Q. And you relax in the cafeteria?

A. Yes.

Q. Is it your contention in this case that you should be paid for that time that you are sitting in the cafeteria watching TV and relaxing before you start work?

A. No, that's the reason why I arrive to work 45 minutes to 30 minutes early.

Q. There were a lot of questions about sanitizing and washing. Are you required to sanitize your hands before you enter the production floor?

A. Yes, you are.

[707] Q. And would you agree with me that it only takes a second or two to sanitize your hands?

A. It depends on the congestion of the hall or the area. A lot of times it is crowded. Depends on the shift change and people going in and out of different departments.

Q. Now, you didn't say that in your deposition, did you, when you were asked that question?

A. Crowded hallways slows down your process of timing in, punching in. Yes, I did.

Q. We're not talking about punching in, we are talking about sanitizing your hands.

A. It only takes a few seconds to sanitize. You walk by the sanitizer on the wall.

Q. Right. Okay. In your deposition you said—you were asked, "Is there anything else you do to get ready to go to the line?" And you said, "Before I walk into the hallway, the entryway, I sanitize my hands."

A. Exactly.

Q. And the question was, "Okay." Answer, "That's another requirement." That was your answer. And then the question was, "How long does that take—"

MR. DOOLITTLE: Can you tell me what page you are on?

MS. BURKHARDT: Page 90.

MR. DOOLITTLE: Thank you.

[708] BY MS BURKHARDT:

Q. The question was, "How long does that take," and your answer was, "Just a second or two, just run it underneath the sanitizer, rub it all over your hands." Was that truthful testimony?

A. Yes, exactly.

Q. The sanitizer is just there on the wall, right?

A. Right, on the entryway to the hall or the wash stall through the cut.

Q. Is it automatic, you just stick your hands under and the solution comes out?

A. Yes.

Q. And you would agree with me that takes only a second or two?

A. Yes.

Q. Now, as a split saw operator you're not required to dip any of your equipment at the end of your shift, isn't that right?

A. That's correct.

Q. So when you leave the floor, you don't have to dip anything in that dip tank?

A. That's correct.

Q. Mr. Brown, would you agree that it only takes one or two seconds to put in your earplugs?

A. That's correct.

[709] Q. And would you agree it only takes one or two seconds to put on your safety glasses?

A. Yeah.

Q. Would you agree it only takes one or two seconds to put on your hard hat?

A. Yes.

Q. And would you agree it only takes about 15 seconds per boot to put your boots on in the morning?

A. Yes.

Q. Do you think it takes maybe 60 or 90 seconds to put your whites on, your white pants and your shirt?

A. That would be close.

Q. It only takes you a few seconds, maybe three seconds to put your cotton gloves on each hand, would you agree?

A. Yes.

Q. And for your apron, would you agree it only takes you about 15 seconds to put that on?

A. Yes.

Q. But your testimony here today was that you think you're not being paid for something in the neighborhood of 20 minutes of time, is that what you told Mr. Doolittle?

A. No, I did not. 17.

Q. So you told Mr. Doolittle you thought that you are not being paid for 17 minutes of time?

A. Yes

* * * *

[714] Q. This four minutes that counsel also talked about, you timed that, did you not?

A. Yes, I did. Not at Tyson, at Farmland.

Q. Let me ask you, you testified you did the same job and His Honor let me ask you, the job was the same, that was your answer. Do you remember?

A. Yes, that's correct, the same job.

Q. At Farmland did you wear the same—was there any [715] difference whatsoever in what you put on at Farmland than Tyson?

MS. BURKHARDT: Your Honor, objection. First of all it is leading. Second, the Plaintiffs moved in limine themselves to keep out evidence of other jobs; and third, there's been no foundation laid that there's any relationship between Farmland and Tyson.

THE COURT: Hold it. He just said they're the same. The objection is overruled.

THE WITNESS: The only thing different from between Farmland and Tyson on that particular job is the color of the uniform. Blue at Farmland, white at Tyson's.

BY MR. DOOLITTLE:

Q. Any other difference?

A. No.

* * * *

[716] MRYLON KIZER,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WIGGINS:

Q. Good morning, Mr. Kizer.

A. Good morning.

Q. You and I have not had the pleasure of meeting before, have we?

A. No, sir.

Q. I am going to try to get you on and off as quickly as I can. Tell us what your job is.

A. My job is complex manager at the Storm Lake pork facility.

Q. And what—is that the top job at the Storm Lake complex?

A. That is correct.

Q. Everyone there reports to you?

[717] A. Mostly direct, some not at line two corporate.

Q. And you report to no one at Storm Lake, correct?

A. That is correct.

Q. You report to Dakota Dunes, corporate office of Tyson?

A. That is correct.

Q. All right. And how long have you been the top official at the Storm Lake plant?

A. Just a little over 11 years

Q. And how long have you been in the meat packing business?

A. A little over 40 years

Q. And you said—did I ask you how long you have been at Storm Lake?

A. Yes

Q. I am getting tired here, but would you agree that the employees are expected to produce a safe, uncontaminated meat product and that's one of their primary responsibilities?

A. Along with making sure it is very wholesome and in specifications and top quality, yes

Q. And that's very important to Tyson as a business, correct?

A. That's important to our customers and Tyson, yes.

Q. What kind of customers do you sell your meat to from your Storm Lake plant?

A. We sell our product to a lot of customers Some of [718] the local ones, our grocery stores would be like Hy-Vee, Fareway, we also sell to some of the bigger ones, Wal-Mart, Costco, Sysco.

Q. So it sounds like most of your customers are in the business of reselling your meat in the supply chain, correct?

A. Yeah, most—like the grocery stores, they sell right directly to the household people.

Q. All right. But the meat here eventually reaches into schools and hospitals and people's homes, correct?

A. That is correct.

Q. And so it is extremely important that the employees have as their primary responsibility to produce a wholesome, safe product, correct?

A. Correct.

Q. Tyson can't stay in business if it doesn't have a wholesome, safe product to sell, can it?

A. That's a big part of it, yes.

Q. All right. And employees are not allowed to step up to the line at the start of gang time unless they already have all this sanitary gear and equipment on and their personal protective gear and equipment on, correct?

A. Yes.

Q. All right. And if they did not have that personal protective equipment and sanitary gear and equipment that we have all been looking at this week, they wouldn't be able to cut [719] the meat or handle the meat that you are wanting to sell to your customers, correct?

A. Yes.

Q. And so the primary benefit from employees wearing this gear is so they can start to do their work so your conveyor belt can run so your meat can be cut and wrapped and shipped to the customer, correct?

A. Yes.

* * * *

[726] Q. Sure. I am sure that's a concern of yours; but it is also a very important concern of yours as the complex manager to keep your workers' compensation claims and payments to employees who are injured to a minimum, correct?

A. That would be any business' goal, yes.

Q. And by requiring these items to be worn, you're able to minimize workplace injuries which minimizes worker compensation payments to settle lawsuits, correct?

A. That's part of it, yes.

Q. And that's part of your job in running the plant or the complex is to keep your eye on these workers' compensation claims so they don't get out of hand, correct?

A. It's my job to make sure we have a safe work environment for our people, yes.

Q. And requiring this various protective gear and [727] equipment that is to protect the employee, that allows you to satisfy the OSHA requirements, correct?

A. That's part of it, yes.

* * * *

Q. Let's look at Exhibit 153, page one. There we are. We have seen this before in this case and it is in evidence, but I wanted to ask you just a couple questions. First of all, it says there in the first sentence it is for the Storm Lake plant, [728] correct?

A. Yes.

Q. And this says Product Soundness. That's what we've been talking about in terms of a safe, wholesome product for sale on the market, correct?

A. Yes, it is part of it, yes

Q. Now, there's this line here in the third paragraph I want to ask you about. It says, "Tyson Fresh Meats, Inc., has chosen to run its business under the Government Inspection Program." Now, why did you choose to run your business under the Government Inspection Program?

A. Well, the Government Inspection Program is a very high-rated government program and Tyson wanted to be part of that program and to go by those guidelines.

Q. And does the general public put stock in the fact that the USDA has approved your meat?

A. Yes, they do.

Q. That helps you market your meat, correct?

A. It shows that it is a very wholesome, good product, yes.

Q. That helps you sell it and make your profit, correct?

A. It's part of the equation, yes.

Q. All right. And then the next paragraph it says, "The government inspection team has the task of seeing that all requirements of sound product control are applied every day. If [729] regulations are broken, they have the authority to tag production or shut off production until the problem is solved." Now, that—that is referring back to this Government Inspection Program that Tyson has chosen voluntarily to become a part of, correct?

A. Yes.

Q. And the employees achieve that for you by putting on the required sanitary gear and equipment, frock, hair net, beard net, that type of thing, gloves, aprons, which allows you to satisfy the Government Inspection Program and not get shut down, correct?

A. That's part of the equation, yes.

Q. And the primary benefit of not getting shut down is to Tyson, correct?

A. Correct.

Q. So you would agree then that the primary benefit, not the only benefit, but the primary benefit from the wearing of this equipment is for Tyson to operate its business?

A. That and keeping our team members very safe by wearing that equipment.

* * * *

[732] Q. The industrial engineer is one person that reports to you, correct?

A. No, he reports to corporate.

Q. Okay. But you have this—you have a plant engineer that is assigned strictly to your plant, correct?

A. That is correct.

* * * *

Q. All right. The industrial engineers will do time studies of particular jobs and particular aspects of jobs whenever there's a change in the production process, is that correct?

A. Yes.

* * * *

[734] Q. Is it true that more often than not employees work most Saturdays and have a 48-hour week in the production departments?

A. In our case at our plant we work a lot of Saturdays, yes.

Q. Give me your best estimate.

A. Of how many Saturdays?

Q. Yes.

A. I am going to say 60 plus percent.

Q. All right. And when you have Saturdays that means your production employees are working 48 hours a week on gang time, correct?

A. Yes, they're working, yes.

* * * *

[745] Q. Do you recognize where this picture is taken?

A. Yes, this is on the slaughter floor and it's the spike table.

Q. And I believe Mr. Sager referred to the men that are shown here in this photograph as chiselers, is that a familiar term?

A. Chiseling heads, yes.

Q. Do you see the two men in the foreground?

A. Yes.

Q. Are they wearing gloves on the hand they are holding their chisels in?

A. No, they are not.

Q. If you look at the man who is standing in the background holding his chisel, is he wearing a glove on the hand he is holding the chisel in?

A. Yes, he is wearing a yellow cotton glove.

Q. Is that cotton glove necessary for that chiseler to do his job?

A. No, it is probably a comfort, he feels more comfortable using a cotton glove.

Q. And how would that contrast from the two men in the foreground of the picture?

A. They're obviously more comfortable not wearing a [746] cotton glove while they chisel heads

Q. Is the man wearing the cotton glove violating any sort of plant policy by choosing to wear one?

A. No.

Q. Are the two men in the foreground who have chosen not to wear one, are they violating any sort of policy?

A. No, they are not.

Q. Why does the plant provide cotton gloves to the positions such as the chiseler?

A. The main reason is for warmth and comfort and some of them use it to keep their hands dry.

Q. Do you see that the two men in the foreground appear to have facial hair?

A. Yes.

Q. Are they wearing beard nets?

A. No, they are not.

Q. Is that okay under plant policy?

A. Plant policy states that they should have them on, but we don't enforce it because of the temperatures up on the kill floor.

Q. So is that practice specific to the kill floor?

A. Yes.

Q. Do you see that the two men in the foreground are wearing white shirts?

A. Yes, they are.

[747] Q. Are those the white shirts that are issued by the company as part of the whites?

A. Those particular front two are wearing T-shirts. I would guess that they are T-shirts that they purchased themselves.

Q. When you say purchased themselves, do you mean that they purchased at a store, someplace else?

A. Yes.

Q. Their own personal item?

A. Yes.

Q. Is it okay for them to be wearing their own personal T-shirts to work on the kill floor?

A. On the kill floor as long as they are white and they are clean every day.

Q. I would like to go now to Defendant's 2232-41. Do you recognize where this is in the plant?

A. Yes, I do.

Q. Could you just briefly remind us where we are?

A. This is in the cut floor area.

Q. Is this near a machine called a Cryovac machine?

A. Yes, it is a Cryovac packaging machine.

Q. Do you see the man in the foreground?

A. Yes.

Q. Is he wearing an apron?

A. No, he is not.

[748] Q. Do you see the man standing behind him?

A. Yes.

Q. Is that—are these two men performing the same job?

A. Yes, they are.

Q. Is the man behind him wearing a plastic apron?

A. Yes, he is.

Q. Is the plastic apron necessary for either one of these men to do their job?

A. It is not necessary, but it is probably a comfort for the one gentleman with his apron to stay warmer and cleaner.

Q. But if he were not wearing it, would he still be able to do his job on the Cryovac machine?

A. Yes, he would.

Q. Why does the plant provide rubber aprons to team members such as the two individuals shown here?

A. To keep their outer garment—their frock dry and clean. Also it is easier for them to clean up.

Q. If we can now go to D 2232-19 Do you recognize where we are here?

A. Yes, this is on the kill floor on the end of the head table.

Q. Does this man have facial hair?

A. Yes, he does.

Q. Is he wearing a beard net?

A. No, he is not.

[749] Q. Is that okay for him not to be wearing the beard net?

A. Yes, we don't—we don't discipline for not wearing it.

Q. And why have you chosen not to discipline for not wearing it on the kill floor?

A. We just feel that because of the warmer temperatures up there, it is just a deterrent and it just is not comfortable for the team members to wear.

Q. Is that an example of how you have tailored a policy to plant needs?

A. Yes, it is.

* * * *

[771] Q. Let's look at what your policy says in this exhibit, let's look at Section 5.3 called Hand Washing. This says, "Team members must wash hands thoroughly with an approved hand washing and sanitizing compound in an adequate hand wash facility before starting to work, after each break, or any absence from the processing area." That is your policy that you give and tell to your employees, correct?

A. That is written in this policy, but since then because of our hand sanitizers, unless they go into the restroom to use the facility there, they still have to wash their hands; but now with the sanitizers at the front entrance of the departments, they're allowed to use the hand sanitizers that sanitize their hands.

Q. And this policy we're looking at is dated—let's go back to the first page. It says last revised January 5, 2009. So we know at least as of that date employees weren't using just a hand sanitizer like you have described and that you testified to with your counsel asking the questions, but they were required to comply with this policy I just read which says, [772] "Team members must wash hands thoroughly with an approved hand washing and sanitizing compound in an adequate hand wash facility, "correct?

A. Correct.

* * * *

[778] Q. All right. Let's go to your Exhibit 153 which is the one that you said was for Storm Lake itself or by itself. I want to go through some of the rules that you've got on this Storm Lake policy. Let's look at page three, Paragraph 9, says, [779] "Edible product team members assisting inedible product team members must clean hands and change gloves and clothes before

handling edible product." Now, that is your policy and you enforce it, correct?

A. That is correct.

Q. Next paragraph, Paragraph 10, "Equipment improperly placed—inform team member to hang them in the proper place and if they get contaminated, team member needs to clean them immediately," correct?

A. Correct.

Q. That is your policy and you enforce it?

A. Correct.

Q. Paragraph 17, "You need to cover cotton gloves when handling spacers or edible product," correct?

A. Correct.

Q. That is your policy and you enforce it, correct?

A. Correct.

* * * *

[783] Q. But it is true, isn't it, that if you didn't require your employees to do—to wash that equipment after gang time has ended, you would have to pay some other employee to do that, wouldn't you?

A. Well, our team members wash up their equipment at the end of the shift themselves.

Q. I understand that. And that's a benefit to Tyson in the sense that you don't then have to pay someone else to wash them, correct?

A. Correct.

Q. In fact, the only person that benefits from requiring these employees to wash their equipment after gang time ends is Tyson itself, correct?

A. Correct.

* * * *

[784] Q. Paragraph 35 of the same Storm Lake document says, "Aprons, knives, sleeves, or belly guards, et cetera, should be hung on hooks high enough to keep equipment from touching the floor. If equipment touches the floor, it must be washed before using, "correct?

A. Correct.

Q. And that too is a policy that you have at the Storm Lake plant and that you do enforce?

A. That's correct.

Q. Paragraph 41, this is the last one, "If cotton gloves are dropped on the floor, they must be changed for clean gloves." Now, that too is a policy at Storm Lake that is enforced?

A. That's correct.

Q. And the reason that you have that policy and you enforce it is to prevent product contamination, correct?

A. Correct.

Q. Because if the product is contaminated, you can't sell it, correct?

A. It can be reconditioned and then sold.

Q. But that requires extra labor, correct?

A. We have people on the payroll already doing it.

Q. Any—you want your meat to be done right the first [785] time so you don't have to pay someone else to do it a second time, correct?

A. Correct.

Q. And that's an employee responsibility to the best of their capability is to do it right the first time?

A. That is correct.

Q. And that benefits Tyson?

A. Yes.

Q. Makes you run smoother, correct?

A. Puts out more wholesome product, yes

Q. Makes your operation more efficient and cost effective, correct?

A. Yes.

Q. Contributes to profits?

A. Yes.

* * * *

[787] Q. Lastly you said something about your turnover rate being 16.92 percent last month. Now, it has been a lot higher than that before last month though, hasn't it?

A. The prior month it was about 17 percent.

Q. 2009 it was 39 percent, wasn't it?

A. I don't remember the numbers back that far.

[788] Q. Well, you know that your turnover rate was a lot higher in 2009 than it is today?

A. Industry standard was—across the board they all were higher, yes.

* * * *

[818] KENNETH SCOTT MERICLE, Ph.D.,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows

EXAMINATION

BY MR. WIGGINS:

Q. State your name, please.

A. My name is Kenneth S., Kenneth Scott Mericle.

Q. All right And Dr. Mericle, by whom are you employed?

A. I'm employed by the University of Wisconsin Extension.

Q. All right. And did you do some work on a time study at the Storm Lake plant?

A. Yes, I did.

Q. And do you have a degree in industrial engineering?

A. Yes, I have a Bachelor's Degree from Iowa State University in industrial engineering.

Q. All right. And tell us, do you have a Master's Degree?

[819] A. I also have a Master's Degree from Iowa State University in economics.

Q. All right. And do you have a Doctoral Degree?

A. I have a Ph.D. from the University of Wisconsin in industrial relations.

Q. All right. And have you done time studies in the past?

A. Yes, I have.

Q. Is that a—something that comes within the field of training of an industrial engineer?

A. Yes, it does.

Q. How many times have you performed time studies?

A. Hundreds and hundreds of times.

Q. Over how many years?

A. 30—probably about 40 years

Q. When did you obtain your industrial engineering Bachelor's Degree?

A. 1967.

Q. And I don't know if I heard, I might have missed it, what university did you obtain that from?

A. That was Iowa State University in Ames.

Q. Iowa State. Okay. What is a time study?

A. A time study is a study of the—it's usually used to set up—set a production standard so what you're doing in a time study essentially is estimating the amount of time that [820] will be allowed for performing a certain fixed set of tasks

Q. And what did you do in order to be able to do a time study at the Storm Lake plant?

A. At Storm Lake I went to the plant with two videographers, one was a member of my department, another faculty member in my department at the University, and the other was a young man who is an undergraduate in the business school at the University of Wisconsin and we essentially spent two full shifts on one day and one shift on the second day filming

various activities in the plant related to donning, doffing, cleaning, and related work activities.

We then took the videotape and analyzed it. We identified on the videotape the activities, identified the starting point of the activity, the ending point of the activity, and calculated the elapsed times for the activities.

We then for an activity calculated the average time for the activity, did that for the kill area of the plant and the fabrication area of the plant, and computed average times for each of the activities and the total average time for donning, doffing, related work activities for the two areas of the Tyson plant in Storm Lake.

Q. And the work that was done that you just described, was that done on behalf of the—in your capacity as an employee of the University of Wisconsin?

A. The—yes,

* * * *

[827] Q The work you did in conducting a time study at Storm Lake, does that come within your field of expertise in industrial engineering?

A. Yes, it does.

Q. Why?

A. Well, it's—it's similar to what industrial engineers do on, you know, a daily basis when they set time studies, has some important differences, but essentially it involves estimating the amount of time that relates to various work tasks, work activities, and that's what I was doing in the—in the Storm Lake plant.

* * * *

[845] Q. All right. And which days, if you recall, were you at the Storm Lake plant?

A. I was there on April the 23rd and April the 24th.

Q. Of what year?

A. 2009.

Q. All right. And do you know if you ever did any work for Hamilton or McCafferty or any of the Plaintiffs' lawyers in this case before 2009?

A. You know, I don't think so.

Q. Okay. Now, how many hours did you spend in the plant on those two days?

A. I spent about 17 hours the first day we went in at five o'clock in the morning, I don't think we got out until [846] around midnight or so.

Q. Your faculty colleague, I can't remember his name.

A. Michael Childers.

Q. Michael Childers, how many hours did he spend in the Storm Lake plant on those two days?

A. Well, all three of us spent the same amount of time. The first day we all—we spent 17 and a half hours and the second day it was about eight or nine hours

Q. And why did you spend so long on the first day?

A. Well, we wanted to cover both of the production shifts.

Q. A shift and B shift?

A. Yeah, we had two days scheduled and we wanted to collect as much data as we could so we tried to stay for A shift and B shift.

Q. All right. And so that's three people spent about 25 or 26 hours each in the plant?

A. That would be approximately right.

Q. Did you divide the work between you?

A. Yes.

Q. How?

A. Well, we—we—we each had video cameras and we—we generally moved as a group from one activity to another activity, but once people had a general orientation, they were essentially on their own to film the activities so Michael and [847] Gavin were working more or less independently from me.

Q. Okay. And I think it may be easiest to understand this. Let me go a little bit further and then we will use a video to try to understand this. Did you, once you got to the plant, decide to divide up the videotaping into segments of different parts of the plant?

A. I would describe it a little bit differently. We identified activities and we organized the videotaping around the activities. For example, we knew that a lot of the donning occurred in the locker room so we knew that we would be filming donning in the locker room.

Now, there was some complications related to that because some of the donning in the locker room involves stripping down to underwear or to skin and the company took the position that on the first day that we would not be allowed to film in the locker room. On the second day we reached an agreement with them that we would not film the people in the kill area where they did the—the strip down, but that we would be able to film the people in fabrication so that's an example of an activity.

We knew that some of the donning occurred in the workplace and so a second activity would be finishing donning in the production area. That was the second activity. In between, of course, you have to walk from the locker room to the workplace and I knew that I was going to have to analyze that [848] walking time. I made a decision not to film that so that we could focus more on the locker room donning and the donning in the production areas and I used an industrial engineering technique to estimate the amount of walking time based on the distances that people walked and standard walking speeds

At the lunch break it is pretty straightforward. At the unpaid lunch break, people have to take off much of their equipment and so we were able to film the doffing of equipment at the beginning of the lunch break and the donning of equipment at the end of lunch break and then the end of the day was pretty much kind of a mirror image of the start of the day, except that there was a more substantial cleaning of the equipment at the end of the day so that people could put clean equipment back into their—into their lockers. I think they are required to do that so we have doffing and cleaning in the work area and then we have the final doffing back in the locker room and again I estimated the walking time from the work station to the locker room.

Q. All right. Now, did you submit a report to Tyson about your time study?

A. I submitted a report to Plaintiffs' lawyers, yeah.

Q. All right And then I want to show you Table 5 to your report and if we could get that up.

THE COURT: Is this exhibit in evidence, Mr. Wiggins?

MR. WIGGINS: This exhibit is—what is the exhibit [849] number?

MR. ARCINIEGAS: 242.

MR. WIGGINS: It is Exhibit 242, Your Honor, and we have an agreement with the Defendant that they will not object to the tables

THE COURT: Very well. Are you offering them there?

MR. WIGGINS: We offer.

THE COURT: The tables attached to 242 are received.

BY MR. WIGGINS:

Q. Is this your table that you authored and created for your report that lists the activities that you studied?

A. This is—somebody has taken my results and reformatted and put it on this slide; but yes, these are my activities, my times, my observations.

Q. And other than the colors, is it the same as in your report?

A. Actually the colors are the same too.

Q. The colors are the same?

A. Yes, it is.

Q. Okay. Now, does this list for the fabrication department only what you just described as the activities that you divided in order to study?

A. Yes, and I see that I—there are a couple that I didn't mention. For example, dipping the scabbard and washing hands before going into the fabrication area.

[850] Q. All right.

A. And then inspect and disinfect when you come out.

Q. So—and then you gave each activity a number, one through 10?

A. Yes, except I did not use the number three and to be honest with you I don't remember why.

Q. So there's nine activities for the fabrication department listed, correct?

A. Yes.

Q. All right. What are the pre-shift, before gang time activities?

A. Those would be one, two, and four and that would involve the donning of equipment in the locker room, the walking time is included in element number 10 as part of the walking time, and the dip scabbard and wash hands and the don equipment pre-shift in the department, those are the pre-shift activities.

Q. Okay. And you have a column called Observations.

A. Yes.

Q. What does that mean?

A. Those are the number of subjects who we could identify on the videotape and with usable information on the videotape who performed that activity so I had 88 observations of people donning their equipment prior to the start of the shift in the locker room and 100—

Q. Activity number one, that's activity number one?

[851] A. That's activity number one, so that's just the number of observations of each of these nine activities that we had.

Q. When you did the videotape were you able to use all the observations that you got on the tape?

A. No, there's a lot of video footage where you lose the person or they don't, you know, for various reasons it is impossible to use the information.

Q. What was the bare minimum data that had to be shown on the tape in order for a segment or a sequence for a particular observation to be considered complete and usable?

A. You have to have the time that the activity starts and the time that the activity ends for it to be usable.

Q. All right. Now, let's just take an example. First of all, let's look at the average time and understand that quickly before we go to the table itself. Let's take activity one as an example. That's pre-shift donning at the locker room. You say it's 4.56 minutes in hundredths, correct?

A. That's correct.

Q. That is not four hours and 56 minutes, that's four minutes and approximately a half a minute, correct?

A. That's correct. Industrial engineers use hundredths of a minute rather than seconds just because it simplifies the math, any calculations you make then you don't have to convert from seconds to minutes so the stopwatch that industrial engineers use is calibrated in hundredths of a minute. The [852] video camera is calibrated in minutes and seconds so I convert that to decimal minutes in order to be able to, you know, be able to add and subtract these numbers

Q. Let's look at line two as an example. When we say 0.17, that is not 17 seconds, is it?

A. No, that's .17 times 60, that would be about 10 seconds.

* * * *

[858] Q. 38. Let's stop it at 38. There we are. What is he doing at the moment you stopped timing him?

A. I stopped timing him when he starts the walk.

Q. What is that he took off there? Can you tell?

A. I'm sorry, I wasn't watching the tape.

Q. That's fine. All right. Now, that—what we saw from 2:44:00 to 2:47:38 was how much time?

A. 3.63 minutes

[859] Q. All right. What did you do with that time?

A. That became one of the—of the times that I used to calculate the average time for this particular—for this particular activity, donning in the locker room, so that would be one out of 88 times—

Q. All right.

A. —that I used.

Q. Why do you stop it at the moment he's closed the locker and is turning to about start walking?

A. The walking time is measured from the center point in locker room to the center point in the department, that distance, so in calculating the walking time, I want to isolate the walking activities and use the distance and the speed to determine what the walking time is so the end of the first activity is also the beginning in this case of the walking time. This is when he starts the walking time.

Q. All right. So did you use videotapes on the walking segment from the locker room to the production line?

A No, I used prints that were provided by the company that identified the walking path and the distances and then I multiplied those distances by three miles an hour walking pace for the first part of the walking from the locker room to the department door and then I reduced the speed of walking to 2.5 miles per hour when the subject entered the department so I divided the distance between the center line of the walking—[860] center line of the locker room to the department door and department door to the work station and multiplied by two different speeds, came up with a total amount of time and that became a part of the walking time.

Q. Okay. And is that—is that something that industrial engineers do?

A. Industrial engineers estimate walking time by measuring distances and multiplying by speeds all the time. That's an accepted procedure in industrial engineering.

Q. Is that the way Tyson itself did it?

A. I don't know that I know how Tyson did it. I wouldn't be surprised if that's how they do it.

Q. Okay. Do you know of any industrial engineer that has stepped forward to say you didn't do it right?

MR. MUELLER: Objection. Foundation, and I am not sure even what he is asking, stepped forward to whom.

THE COURT: Sustained.

BY MR. WIGGINS:

Q. All right. Now, for that walking segment where they're taking their scabbard and their belly guard and that type of thing to some other point, did you use what you have been calling observations or sample sizes?

A. No, I don't have to because, you know, I'm estimating that walking time from the blueprint and from the walking speeds so I basically analyzed the walking time once, center point to [861] center point and, you know, get the distances multiplied by the speed and that's the walking time so it is not like the filming where I am filming a bunch of people and computing an average, I am simply calculating what industrial engineers would accept as the average walking time from point A to point B.

* * * *

[864] Q. In your study were you concerned with which particular items a person is putting on in the locker room versus which ones they put out on the line?

A. No, I was not. I was concerned of having a group of people who put on a representative mix of equipment in the locker room and likewise a group of people who put on a representative mix of equipment out on the line. Some people put a lot of equipment on in the locker room and not much out on [865] the production floor and other people put not much on in the locker room and put more on out in the production area.

Q. Let's look at Table 5 again since we're on activity one, what was the average time you found from your study of all 88 individuals like we've been looking at?

A. 4.56 minutes. It is four minutes and 31 or so seconds, 32 second seconds.

Q. So the first man we looked at in sequence 77 was a little bit less than that?

A. Yes.

Q. 3.63?

A. Correct.

Q. The second man on sequence 76 that we looked at was a little bit more than the average, he was at 5.05?

A. That's both correct.

Q. Did you see anything that they did during that three minutes for one and five minutes for the other that you felt like should have been taken out and not counted?

A. No.

Q. All right. Now, we have now seen two of those 88, correct?

A. Yes.

Q. Now, we don't need to see all 88 to understand your system, do we?

A. No.

* * * *

[886] Q. All right. Now, is videography an accepted means [887] within the field of industrial engineering for conducting a time study?

A. Yeah, you can do a time study from a video image, you can use a video camera to collect the times so yes, it is accepted as a way of capturing the time for the activity that you are studying.

Q. All right.

A. That's one step of doing a time study, but it is a very important one and yes, it is a perfectly legitimate technique.

* * * *

[895] Q. I want to talk to you about the methodology. Would it be a proper method to determine the times or the reliability of the times to look only at the shortest person and the longest person rather than all of the people that were observed?

A. No, this is an important point I think because you're—you would be zeroing in on only two of the subjects and on—on my activities I have sample sizes that are on average 53 subjects per activity so you'd be making a comparison of the two extremes, the person who took the shortest amount of time and the person who took the longest amount of time.

If you actually look at the time values, most of the times are clustered around the average so what they'd be doing is drawing some conclusions way out at the extremes that really don't have much to do with, you know, what is really being captured here which is that there's a lot of central tendency, most of the people are using about the same amount of time, plus or minus a little bit, so not a very relevant comparison in my opinion.

Q. All right. Let's take the shortest person, let's take [896] a hypothetical. If we look only at the shortest amount of time for pre-shift donning in the locker, would that tell us anything reliable to know?

A. No, I don't think so. You would want to know what the individual was doing, but again, I would repeat what I said before, you can't zero in on one individual, particularly the most extreme individual, and draw very meaningful conclusions from it. That person may not

have required much time because they decided that they're going to don most of their equipment in the department as opposed to in the locker room or, you know, the person might be exceptionally fast.

The person could just be, you know, vigorous, done this a lot, really knows how do it the most efficient way, prides himself on doing it the most efficient way, decides not to do much of it in the locker room, I don't think that observation alone tells us anything really of value about—about the—the calculations of the average and the use of the average to understand how much time it takes the group of people to do the activity.

Q. Okay. Let's put up Table 5 one more time. If you took—

MR. ARCINIEGAS: Five or six?

MR. WIGGINS: Five.

Q. If you took the shortest person for activity one, what would that person likely be for activity four?

[897] A. Likely not to be the shortest.

Q. Why is that?

A. Well, because probably the person who was the shortest on activity one was donning less equipment in the locker room and putting more equipment on in the department.

Q. And by the same token if we took the longest person in the locker pre-shift, would we know anything about him if we didn't know also what he did out on the line, if anything?

MR. MUELLER: Objection. Foundation and form.

THE COURT: Overruled. Answer, if you understand it.

THE WITNESS: Could I hear the question—

BY MR. WIGGINS:

Q. It was a bad question. Let me rephrase it. Is there a relationship between the donning in the locker room and the donning in the production line?

A. Yeah, there's a relationship. You don the equipment either in the locker room, you might don it while you are walking between the locker room and the department, or you don it in the department, one of those three locations, so if you do it in one location, you don't do it in the other locations.

Q. So if you're a short person in the locker room, what are you likely to be at the production station?

A. At the very least longer. You might be a long person, but you might not have a lot of total equipment to put on.

Q. All right. Now, if we were to just take a group of—[898] let's just say we don't take the very shortest, we just take a group of the short people, would that be a reliable method for determining anything about these times?

A. I don't think any method where you select a subset of the total data set and draw conclusions from it really tells us very much of value in terms of estimating the the amount of time for the activity. If the data is available, we should use all of it.

Q. If we had a person or a group of people that had a short amount of time in the locker room, do we know where they donned the rest of their equipment?

A. Well, they either donned it while they were walking to the department or they're going to don it in the department.

Q. And you did not film the walking in the hallway?

A. No, I didn't.

Q. Now, by the same token if we take a group of the shortest people in the locker room and compare them to the longest people in the locker room, is that a fair comparison?

A. Depends on what kind of conclusions you're—what questions you're asking I guess; but, you know, the people who are in the group that takes the shortest amount of time on average will be donning fewer pieces of equipment.

Q. Right. Okay. So just looking at a short time doesn't tell you how many pieces of equipment they were donning, does it?

[899] A. No.

MR. MUELLER: Objection. Leading.

THE COURT: Sustained.

BY MR. WIGGINS:

Q. What other factors will cause one person's time on one segment to be shorter or longer than another person's?

A. Well, they might do it in a slightly different way, they might do the activities in a different way, they might have different levels of skill, they might have different physical health, they might have some restrictions, work pace comes into play, a lot of different factors come into play when, you know, we're trying to explain individual differences in this way. That's why we take large samples.

Q. What is allowance time?

A. Allowance time is a concept that is used in setting a production standard by industrial engineers and in the process of setting a standard, the industrial engineer will estimate the amount of time that is required for performing the task that they're studying, okay, so that's kind of like the pure work time and in recognition of the fact that people don't do pure work their entire work shift, engineers build allowance time into the standard.

Why don't they do—expect people to do pure work the entire shift? Well, people have needs, they have personal needs, they need to go to the bathroom, they need to get a drink [900] of water, they have social needs, they need to talk to their co-workers, they experience fatigue during the day and so a part of the allowance time reflects the fact that work is fatiguing and they experience delays, they experience short delays during the day that takes time away from doing work so in order for the production standard to be fair, the industrial engineer will add a certain percentage of time to the pure work time in recognition of the fact that people do get fatigued, that they do have personal needs, and that they—they experience delays so that's the concept of allowances.

Q. And is there a standard that industrial engineers use to factor in these allowances?

A. You know, they're—depends on the nature of the work. Some work is more fatiguing than other work, in some circumstances the personal needs of the work force will be higher, so there are a kind of guidelines in each of these areas. The textbooks will typically talk about allowances in the range of 10 to 15 percent of the pure work time.

Q. All right. Did you include any allowance time in your study at the Storm Lake plant that we've been going over?

A. No, I wasn't setting a production standard. I was trying to estimate how long it took these people to do the activity so I did not—I did not estimate the pure work time and then add the allowances back in again.

What I did do was if they experienced a short delay, [901] maybe there's congestion in their walking path or they have to wait to get around somebody to get access to something, I—or if they stopped and talked for a minute, it's very seldom a minute, if they stopped and talked for a few seconds to somebody, I left those time values in in recognition of the fact that those—in a production standard some time for that activity would be put back in.

* * * *

[902] Q. Now, if someone were to disagree with you and wanted to cull out something else, let's say maybe it is not a bathroom, maybe they thought they talked a little bit too much [903] or they went off camera somehow and you couldn't see them at that moment, could someone go in such as Tyson and use your tapes and use your start and stop times that calculate the elapses and edit these times?

A. Yes, my—my study is totally transparent in the sense that I identify every subject who I studied from the point that the activity started until the point that it ended, I identify the videotape and the DVD or the source material for the images so anybody could go back and run the DVD to the point where the activity started, watch it during the activity until the point that the activity ended and decide that they have a

different opinion about what time should be included and what time should be excluded.

* * * *

[906] Q. Now, let's say that someone looked at that particular clip and said I think 15 seconds ought to come out of that. Could they do it?

A. Yes.

Q. And they would just have to do what?

A. They would have to locate the tape, 17, they would have to load it into a—excuse me, it is a DVD at this point, they would have to load it into a DVD player, they would have to advance to the time at the start of the activity, 5:57:14, and then they would have to watch it from that point until the end of the activity drawing whatever conclusions they want to draw about what they saw.

Q. Let's say that you started at 5:57:14 and 20 seconds later there's a 15-minute interlude of some kind, either they went to the—15 seconds, they went to the bathroom, talked to someone too long, did something. What could you do to edit out that time?

A. Well, you could—you could do a lot of things. You could add a couple columns to the spreadsheet, put the starting time in, the ending time of that interlude, calculate the elapsed time, and then subtract it from this number right here. (Indicating)

Q. Do you know of any industrial engineer at Tyson that has done that?

[907] A. Not to my knowledge.

Q. Let's take that down. I want to change subjects. Did you film continuously from the first activity in the locker room to the last activity on the line pre-shift?

A. No, I filmed those in—as separate activities.

Q. All right. So you don't have a constant first activity in the locker room all the way to the last activity when gang time begins, do you?

A. No, I don't.

Q. Why?

A. If I were to do that, I would have to select the individual and follow the individual as they donned the equipment in the locker room, walked to the line, finished donning on the line, and it would take a considerable amount of time to time one individual and so the number of individuals we would be able to time would be far fewer than if we had timed the activities separately in the locker room, in the department, and in estimating the walking time. If I were to do it picking up the same individual and following them, it would take weeks to do a study like this.

Q. Do you know of any effort by Tyson industrial engineers to do that?

MR. MUELLER: Objection. It's not—he has no foundation either way.

THE COURT: Sustained.

[908] BY MR. WIGGINS:

Q. Did you do this on a job-by-job basis, that is just take the ones on this particular job and then study them and then take this particular job and study them all separately?

A. No, I didn't. I studied people in the two areas separately, in kill and fabrication. There's no way that I could know what a specific job an individual does.

Q. What effect would it have on sample size, if any?

A. I think it would reduce the number of observations of the sample size pretty substantially because I would have to determine what their job is and that would take a fair amount of time and I—it would slow the whole process down.

Q. Okay. Now, I want to go back to sequence 77, the very first tape we looked at. Do you remember the fellow that had—took out the big coat and put it on?

A. Yes, I do.

Q. All right. And we saw other people to the side of him also putting on sweaters and things, but I want to ask you about that. Did you include employees taking things out of their lockers such as personal sweaters, coats, jackets to put under their frock?

A. Yes, I did.

Q. Why?

A. Because the temperature in the fabrication area is below 40 degrees and you can't go into that area and work all [909] day long with just the smock on so people put on extra insulation. You can't do the work really without putting a jacket or a sweater or fleece or a hoodie or something on to keep you warm.

* * * *

Q. When you were doing this time study, were you alone?

A. No.

Q. Who was going around with you?

A. There was a group of people who followed us around that consisted of Defendant's lawyer and some representative from management which included some

human resource department managers, industrial engineer I think, yes, there was at least one industrial engineer, Plaintiffs' lawyers were frequently there so each of the videographers had three or four people with them.

Q. All right. And did you see that—did that include management officials?

A. Yes, it did.

[910] Q. And do you know of something called an observer effect?

A. Yes, I do.

Q. Sometimes known as the Hawthorne effect?

A. Yes, I'm familiar with that concept.

Q. What is that?

A. The concept is based on studies done at Western Electric, Hawthorne plant of Western Electric some time ago and they are classic studies in social science. Basically what the company did was researchers set up a series of experiments and then they manipulated the lighting, they manipulated the amount of attention people were getting from their supervisors, and then they attempted to determine whether these interventions had any impact on productivity and what they concluded was that just the observation of the activity had an impact on the behavior. Okay. So this became known as the Hawthorne effect or the observer effect and the basic idea is that in observing somebody, you alter their behavior or they alter their be—that's a better way of saying it, they alter their behavior in response to being watched, being observed.

Q. What alterations are possible?

A. They could go slower or they could go faster.

Q. If management is watching, what is likely?

MR. MUELLER: Objection. Foundation.

THE COURT: Overruled. Answer the question.

[911] THE WITNESS: Well, I've been doing this for a long time and you can't do a study like this without observing people and when there's people of management, people—along my experience is more people slow up—excuse me, speed up than slow down.

* * * *

Q. All right. The sample sizes, have you formed an opinion about the sufficiency or adequacy of the number of observations in your sample?

A. Yes, I have.

Q. What is your opinion?

A. My samples are large and they're adequate for this kind of a study. My average sample size was 53. That's very large compared to most of the work of this sort that's typically done.

Q. How did someone become a subject on a—one of your video clips? Was it done randomly or how was it done?

A. Well, random is a technical term that statisticians [912] use and what they mean by it is that everybody in the population that you are studying has exactly an equal chance of being included as a subject in the study and the way you would have to go about doing that is you would have to uniquely identify each person in the population and then the easiest way to understand it is put all the names in a hat and pull out the names of your sample and then you would have to identify those individuals and follow only those individuals and collect times on the individuals in the sample.

That's really impossible for me in a situation like this. I don't know who the individuals are, it would take a very, very long time to identify the individuals and follow only the individuals who were in a pre-selected sample like that and so instead of doing that, you can see pretty well from the video clips what we did. On some of these activities we stationed ourselves at the area where the activity was going on and then people would arrive, they would essentially self-select into our study. We weren't picking anybody who we thought was slower or faster, we were taping—taking the people who self-selected to come to that particular work station and do the activity at that work station.

Pretty good examples of that were the hooks outside of the work areas where people had hung their—their equipment and they are going to don it or, you know, after the lunch break or doff it before the lunch break so what we end up with is what [913] I would describe as a representative sample of the people who—who work in that area and perform those activities. Technically speaking it is not a random sample, but it approximates random representation.

Q. Would you say you would ask the person to identify themselves?

A. We filmed and the first usable person, we are going to use that person. If there is more than one usable person in that frame, we will pick whoever we have a starting point for and an ending point for.

Q. Let's take an example of entering the production room floor. How did someone entering the production room floor become a subject to be videotaped?

A. Okay. We did that in two ways. One was to station in those—those areas just outside the door just before they dip the equipment, we're in there and as

they come in we begin the filming process so they self-select and present themselves there and inside the department is very similar, we station at various points within the department where—and we do that in a representative way, we try to cover the department and as people come in and continue their activities, we film the group and select the people who have presented in that particular area, presented themselves in that particular area.

Q. When you say say self-select you don't mean they signed up?

[914] A. No, no, I mean they arrived.

Q. Was there any way at the moment someone would arrive as you turned the camera on for you to know whether they were going to prove to be a fast person or a slow person?

A. No, I had no contact with anybody from this labor force prior to doing this study. I would have no way of knowing that.

Q. What role did your assistants play in the process?

A. In the field work they were doing the same thing that I was doing. They were stationing at various points in the department and filming the workers who presented themselves in the way that I have been describing.

Q. All right. Of the total video clips, do you know approximately how many you yourself were the videographer?

A. It would be approximately one-third, but I did—it is—the videographer is identified and we can tell from the sequence numbers. I could tell you exactly.

Q. That's on that—the spreadsheet shows it?

A. Yeah, the spreadsheet doesn't show it, the body of the report indicates that Gavin Niemi was responsible for tapes one through seven; Childers for eight through 14; and Mericle for 15 through 17. Now, I only did three, but mine were two hours long and theirs were only one hour long so we all shot approximately the same amount of videotape.

* * * *

[916] Q. All right. Now, let's go back to Table 5, we are about done I think, Table 5. We will just take fab first. You [917] have 18 minutes total for these 10 activities. Do you have an opinion about whether that is a fair and reasonable calculation of the time it takes to perform these activities?

A. I do. I believe that that time is fair and reasonable and, in fact, somewhat conservative in terms of the amount of time that is required to do these activities.

Q. And why is it conservative?

A. Because it leaves out certain activities that we talked about before. It doesn't capture any of the walking from the work—very little of the walking from the work station at the break to the point where they doff the equipment.

Q. Doesn't capture any of the hallway time?

A. Doesn't capture the hallway time, activities in the hallway.

Q. Does it capture any bathroom time?

A. No, it doesn't.

Q. Does it capture any—well, strike that. Let's go to Table 6. Have you formed an opinion about the fair and reasonable amount of time it takes to perform these activities in the kill department?

A. Yes, I have.

Q. And what is that opinion?

A. That my opinion is that it takes 21 minutes and—21 and a quarter minute for the donning, doffing, and related work activities.

[918] Q. And what is that based upon?

A. That's based on, you know, my analysis, everything that we have been talking about basically.

Q. And is that a conservative or a liberal estimate?

A. I would make the same statement that I made about fabrication, I believe that it's a fair estimate. It is a bit conservative. I think the—the actual walking probably takes more time than my estimates of the walking and I, you know, because I missed some of the activity, the walking activities.

* * * *

[961] Q. You didn't even study everybody in the plant, right?

A. No.

Q. Okay. And so, in fact, I think you told Mr. Wiggins it would take too long to do that, right?

A. That was a different context so I don't agree with that understanding of my response.

Q. Do you think it is practical to follow employees every day with video cameras, taking them back to a lab, and analyze the numbers for the time they spent on the activities you measured?

A. I can't imagine—I mean, I—practical, it is practical to—if you have a reason for doing it to videotape people.

Q. Is it practical to track all of the employees with video cameras every day?

A. It wasn't practical in the context of this study to do it because—

* * * *

[965] Q. Do you remember getting full schematic diagrams of each floor of the plant?

[966] A. I have never got full schematic diagrams. I got eight and a half by 11 copies of diagrams of each floor at the plant.

Q. They were reduced to fit on a piece of paper, right?

A. I requested full-size drawings of the scale and I didn't receive that.

Q. Okay. What you got, was it sufficient to come up with the walking time number you gave Mr. Wiggins?

A. I chose for practical reasons to accept the company's statement of the walking times—the walking distances, not the walking times. The walking distances.

Q. So you got distance information from the company that you considered sufficient to make your calculations, is that right?

A. Yes.

* * * *

[977] [. .] and I've testified all along here, I have numbers for slaughter and fabrication. Fabrication includes cut.

Q. It also includes retrim, right?

A. Yes.

Q. You lumped cut and retrim together and came up with one number, correct?

A. Yes.

Q. And do you know that within kill, cut, and retrim there are lots of small departments?

A. I think I knew that. There typically are breakdowns of these broad activities.

Q. And you didn't measure each department, did you?

A. No, I did not.

* * * *

[994] Q. I am going to have you take a look from the beginning of your clip as you measured it. Right there. (Indicating) See that woman walking up to the line?

A. Just a second. Is that the starting point? I closed my sheet. What was the number again? 166?

Q. Correct.

MR. MUELLER: Go back a second and freeze it. Stop.

THE WITNESS: So that would be, yes, she's arriving at that particular point in time, she would probably be the first person. I would check the back end to see if that's the specific subject that's associated with sequence number 166.

BY MR. MUELLER:

Q. Do you see that she is inserting her earplugs as she is walking up to the line?

A. I see that, yeah.

Q. Do you see she is carrying some gloves?

A. Yes.

Q. Watch her until the first piece of meat—

MR. WIGGINS: We are going to object, Your Honor. We [995] haven't established that is the subject until we know the end time.

MR. MUELLER: He said it is the subject.

MR. WIGGINS: He said without knowing the end time you can't know which one of these is the one for this clip.

THE COURT: We will assume for the sake of the questions. Just play the clip, please.

BY MR. MUELLER:

Q. So watch the—

A. Your Honor, I am to assume that this individual—

Q. Tell me if I am wrong at the end. We are going to get to the end. Just assume this is your subject. (Indicating)

A. This one? (Indicating)

Q. If you don't remember, tell me when you finally do remember.

A. Can you see the one that I've marked?

Q. Yes. I want you to watch as the meat comes down the line. Let's play the tape. I am going to tell you the meat is going to first come down over here. (Indicating) See that piece?

A. I am sorry, when you say—I'm sorry. I see it, yeah.

Q. That piece? (Indicating) If it helps, watch when she grabs the first piece of meat that she grabs. Go

forward a little bit. Right there. (Indicating) Did you see her grab the [996] meat?

A. Yes, I did.

Q. She is on gang time now, right, because she is working with the meat, right?

A. Can we see some more?

Q. The question is—

THE COURT: Can you answer it?

THE WITNESS: I don't have the information necessary to answer your question. I will try to answer your question, but can I see some more?

* * * *

Q. Okay. Now, let's watch—keep watching the tape. I am going to go look at 6:18:51—actually we may have to go back a little bit. I want you to look two people to her left at this person right here. (Indicating) See this person? (Indicating)

A. Yes.

Q. All right. Watch from 6:18:51 and tell me if the meat gets past him at some point. See the meat here (Indicating) in front of him?

A. I think that's on the other side of this central thing so—

Q. Go ahead. But the meat has come to that position on the line. Do you see it is right in the position where he is?

A. This is the meat that is coming to his position, the piece that is coming right now.

Q. Fair enough. At least by 6:18:57 according to the assumption I gave you, he's paid on gang time, right?

A. No, I don't think so because the meat hasn't arrived at his work station. She may take that first piece. The fellow [1001] back here (Indicating) to her right may take the second piece and there may be a third or fourth piece that eventually gets to him.

Q. Keep watching the line.

A. I disagree with that.

Q. Watch the line. Do you see that piece of meat? Let's say right here at 6:18:57.

A. I am seeing her reaching for it.

Q. Just keeping watching that portion of the line. While this person walks down the line, there's now a bunch of meat coming down the line.

A. She carried it over. There's nothing that reached his work station yet.

Q. It has—

A. According to your definition I think that's where the gang time would have started, at that station, according to your hypothetical.

Q. Where is the guy? He is way down here (Indicating) on the line?

A. Down the line, yes.

Q. Let's keep watching him. Run the tape. He talks to some people, right? Do you see him talking to the line again? Dr. Mericle, did you see him—

A. I'm sorry, yes, I did.

Q. Do you see him come back to his station?

[1002] A. Yes.

Q. Do you see he is still putting on gloves?

A. Yes.

Q. Do you see him adjusting his belly guard? Watch this coming up at 6:19:40. He is going to start adjusting his belly guard. Do you see what he is doing?

A. Yup.

Q. He is pulling it to the right of him, right? Meanwhile meat is going right past where he would have been?

A. So far only three pieces of meat have passed his station.

Q. Because the other workers are carrying the load, right?

A. No, they're—I wouldn't say that that was the case.

Q. All right.

A. You know, it is like I said, at the start the meat comes down intermittently and, you know, there are big spaces in between. Sometimes they let it pass, sometimes they will pull it off and let it sit in front of them for a period of time, sometimes they will put it over and start working on it.

Q. Okay. Let's just go forward a few more seconds.

A. Eventually it is going to get real steady and they will all be working.

Q. Meat is going right past him and he is not touching it, right?

[1003] A. He is still making adjustments I think.

Q. All right. Keep going. Now, under your methodology you would have—if he were one of your subjects

you would have counted all the time we just saw, right?

A. That's correct.

Q. Okay. Can we agree that those two individuals were not fully dressed and ready for work during the period of time you would count in your study? Let me rephrase that. Those two individuals did not arrive at their station early and fully dressed, correct?

A. That's correct.

Q. They waited until there was some meat moving on the line, right?

A. No, they weren't completely dressed before the meat started moving on the line.

Q. Okay. Am I correct that there are a number of instances on your tape of people dressing after the meat is already moving past them?

A. That's correct, because in my tapes I was studying the time for donning and doffing.

Q. Okay.

* * * *

[1008] Q. Okay. Let's go forward and tell me if he is still doing a bunch of donning after the meat is just coming by and piling up at his station.

A. The meat is not piling up at his station.

Q. You have two pieces sitting right off to the side right there, (Indicating) right?

A. It is not piling up. He pulled two pieces of meat over.

Q. Okay. So you agree with me that that donning was happening after the meat had passed his station?

A. Yeah, there were pieces of meat that passed the station and the donning—some of the donning—the tail end portion of the donning occurred after the meat passed the station.

* * * *

[1023] Q. And you based your calculations of walking time on these distances and related diagrams, correct?

A. I—yes, that is correct.

MR. MUELLER: Your Honor, I move in Defendant's 2015.

THE COURT: Received.

BY MR. MUELLER:

Q. Let's show them to the jury now. I have control over that. Let's go back to the first page. So what you learned from this is that Tyson's—somebody at Tyson had done some detailed calculations of how long it took both men and women to walk various distances in the plant, correct?

A. Yes, that's true.

* * * *

[1027] Q. How did you determine the scale? With a wheel?

[1028] A. No.

Q. How did you determine the scale?

A. I took—I measured the distances marked on the print for the walking path, I knew that that distance was the equivalent of what the company had indicated on this table, and I determined the number of feet that was represented by each millimeter of walking distance

based on the straight line walking shown on the diagrams and I derived the scale from that.

Q. I think you told Mr. Wiggins yesterday you considered that reliable, right?

A. Yes, reliable if the diagrams are reliable and if the distances indicated by the company are reliable.

Q. You gave an expert report which you signed believing that it was reliable?

A. Yes.

Q. Okay. So—and then you took—you looked at a book by Niebel, I may have it here, which industrial engineers use some standard numbers for how fast human beings walk, right?

A. Niebel was a reference on walking speed and that is based on years and years of experience in industrial engineering with all kinds of sources for the three mile per hour walking speed.

* * * *

[1032] Q. Okay. And you came up with on the kill side for men, you came up with 3.85 minutes total daily walking time, right?

A. That's correct.

Q. So Tyson's number for the amount of time walking per day is actually higher than your number, isn't it?

A. Very slightly, yes, it was.

Q. All right. For the women, Tyson came up with a number—what was your number? Was yours 3.23?

A. Yes, it was.

Q. Again, Tyson came up with a higher number than you did, right?

A. These—the differences are very small; but yes.

Q. Okay. Now, let's look on the cold side. On the cold [1033] side did you come up with 3.20?

A. Yes, I did.

Q. Your number was slightly higher than Tyson's for the men on the cold side, right?

A. Yes.

Q. And you came up with 2.63 minutes per day for the women to walk on the cold side, right?

A. Yes.

Q. That was slightly higher than what Tyson came up with, right?

A. Yes.

Q. So—but the differences here are fairly small, right?

A. Well, the differences here are more significant. I mean, about a half a minute in each case.

Q. So your number for the men you think Tyson, their walking time calculations are 28 seconds too low per day, right?

A. Yes.

Q. And you thought that we came up with a number that was 29 seconds per day too low for the women, right?

A. Yes.

* * * *

[1035] Q. As we can see, Tyson's numbers were higher than yours on—for men on the kill side, right?

A. Very slightly higher, yes.

Q. And Tyson's numbers were higher for the women on the kill side, right?

A. Yes.

Q. And then you had a 28 second higher number per day for men on the fab side, right?

A. Correct.

[1036] Q. And you had a 29 second higher number for women on the fab side, right?

A. Also correct.

Q. And that is per day, right?

A. Yes.

* * * *

[1037] Q. And at the end of the day you have broken that into three pieces, right?

A. Correct.

Q. Can we pull up Table 6 of his report, the colored version? And you did something very similar on the kill side, right, there's just two activities in the morning and two at the end of the shift, right?

A. Yes.

Q. You have a total of one, two, three, four, five, six activities you measured across the day for donning and doffing, right?

A. Yes.

Q. All right. Now, let's see if we can agree on some basic principles. You didn't measure all of this stuff continuously from the start of the day to the end of the day, right?

A. Well, they don't occur continuously so I couldn't have timed them continuously from the start of the day to the end of the day.

Q. Right. They don't occur continuously, do they?

A. No, of course not.

Q. Okay. And you also didn't follow any one person from [1038] when they first touched anything until they last touched anything at the end of the day, did you?

A. No, I didn't.

Q. In fact, you didn't even follow the same people pre-shift, the people you followed for donning in the locker room are completely different people than the people you measured putting on their equipment in the department, right?

A. Not necessarily completely different. There may be some overlap, but they are different groups of people.

Q. Okay. But more likely than not they're mainly different people, right?

A. Yes.

Q. If you go back to Table 5, that's true of your fabrication measurements too, right, you have only 88 people in—I will say 88 people in the locker room donning pre-shift, right?

A. Yes.

Q. But when you get to the department, you only have 23 fabrication employees you measured, right?

A. That's correct.

Q. So it is either a small subset of the people you found in the locker room or just a totally different group of people, right?

A. Yes, I just would repeat my previous answer to that. There may be some of the 88 in the 23.

[1039] Q. The same at the end of the shift, you got different numbers because you can't say that these are the same people you are following?

A. I never made that claim.

Q. Okay. I know, but can you answer my question? They're not the same people, right, you can't say that, right?

A. I think I answered that. There may be some of the same people. By and large they are not the same people.

Q. Okay. Now, at least in some other cases you actually have followed the same people from the time they first touched until they got to their line, right?

A. I may have done that, yes.

Q. Actually you did do it at a company called George's Poultry, right, you filmed the employees continuously from the time they entered the building until the time they were at their work station ready to perform work, is that right?

A. I think that is correct.

Q. You did not do that here, right?

A. No.

Q. Now, same thing at the end, you didn't follow anybody from when the line stopped until they disposed of their laundry bag, did you?

A. No, I did not.

* * * *

[1050] Q. Okay. Very good. Now, you also didn't break it down between knife users and non-knife users, right, you just lumped everybody together, right?

A. I didn't differentiate between knife users and non-knife users, no.

Q. So you cannot tell us how long it takes to put on just what we call the standard items that are worn by the people who don't use knives, correct?

A. I don't think I could resort the data to find that out. I think I would have to go back to the source tapes and make a decision about each individual, whether they are knife users or not knife users. There's nothing in my report that divides them in that way.

Q. Actually when you look at people, in some parts of your tape there's just no way you are going to be able to tell [1051] if they're a knife user, right?

A. I don't know the answer to that question because I haven't done that activity.

* * * *

[1064] Q. Okay. Now, when you got to our plant, you got there in April of '09, right?

A. That's correct.

Q. And you wrote the report in June of '09, right?

A. That's correct.

Q. That was the first report—the first report in your career in which all of a sudden you stopped any individual [1065] measurement in your report of individual pieces of clothing or equipment, right?

A. I think that's probably the first time that I—that I defined broad activities and measured only the broad activity, yes. The previous studies had measured broad activities and then in the analysis phase broken them down into smaller activities.

Q. Right. And that's the first time you worked with these lawyers, correct?

A. Yes, I think it was, yeah.

* * *

[1104] Q. Dr. Mericle, I want to ask you some questions about random sampling. It has been suggested in this courtroom by someone that you filmed people as they came out, that you didn't choose who came out first, just filmed them as they came out of the locker room and that that was supposedly completely random. Here is my question: First of all, you didn't film anybody as they were coming out of the locker room, correct?

A. I think that's correct.

Q. Okay. So the only place you were selecting people related to the locker room was when they came into the locker room, correct?

A. The only—I am sorry, repeat the first part of that question.

Q. When it comes to locker room related activities—

A. Yes.

Q. —you were filming people as they came into the locker room, correct?

A. That's correct.

Q. And if you look at your report, am I correct the word random does not appear anywhere in there?

A. I think you're correct. I don't recall using the word random in my report.

Q. Am I correct that if I look at your report, we are not [1105] going to see any statement by you that what you did was representative of all the people at the plant? The word representative is not in there, is it?

A. I don't know the answer to that question.

Q. You can look at it. What is it, two pages, three pages?

A. I don't see that word in the narrative portion of my report.

Q. Just so the jury understands, when you study a group of people, that big group is called a population, right?

A. Yes.

Q. And because it is not usually possible to study everybody in the population, you study a smaller number of people, right?

A. Yes.

Q. And that's called the sample, is that right?

A. Yes.

Q. And the goal is to try and select that—the people in the sample so that they're representative of the bigger group, the population, correct?

A. Also correct.

Q. And for that to be random, everybody in the population must have an equal probability of being selected for the sample, correct?

A. Yes.

[1106] Q. And here you cannot say that everybody had an equal probability of being selected for your study, can you?

A. That's correct, and I think it is not really possible to do that under the constraints that I operated.

Q. Right, and so you did not do a random sample, did you?

A. My sample does not meet the technical definition of a random sample.

Q. Thank you. In fact, you have no way of testing to determine if the people you selected for your study took more or less time than if you had done a pure random sample, correct?

A. I have no way—well, I suppose the way of doing it would be to do a study that was based on random sampling and then compare that to the results of my study so I think the answer is yes, I could do that; but not under the constraints of this procedure.

Q. And that's a hunch, right?

A. No, it is not a hunch.

Q. Do you remember telling me that you didn't have any way of testing statistically, your study was random?

A. I would need to see the context of that question to be able to respond.

Q. Take a look at the bottom of 216 in your deposition, carrying over to the top of page 217. Do you see I was asking you—

A. Could you give me a moment?

[1107] Q. Just read to yourself.

A. Let me read to get the context here.

Q. Do you remember at the bottom of page 216, starting at line 14, I was just asking the question of if there had been any bias built into your selection process that would have caused you to focus on people who were taking more time than the average employee doing the activity. Do you see that?

A. I am not sure what you are referring to. I don't see those—that line of questioning right here.

Q. Are you reading your deposition in this case? What do you have on the front cover? What does that say?

A. Bouaphakeo depo, page 216

Q. Yeah, do you see at the bottom, line 17, you say, "I don't think so?"

A. That's says, "I don't think so."

Q. Just read to yourself. Just read to yourself to see if it refreshes your memory.

A. I say that, "I don't think there's any—"

Q. That is not the question. I asked you whether—you were saying that you didn't think there was any bias built into your selection process, right?

A. Yes, that's about what I was going to answer.

Q. Okay. Now, then, this happened. I asked you, question—

A. I'm sorry?

[1108] Q. I am sorry, I asked you then a question about it, right and I said, "That is a hunch, right, you don't have a statistical basis to say that?" Answer, "No, I don't know of any way you can test that statistically," is that right?

A. That was in reference to that whole—that whole statement.

Q. Okay. Now, I am going to ask you about—let's pull up table—we don't have to pull it up. Remember we keep seeing Table 5 and 6, you measured a bunch of people in fabrication, right?

A. I measured a bunch of people in fabrication.

Q. And you measured a bunch of people in kill, that is Table 6, right?

A. Correct.

Q. All your numbers in this case come down to whether you were right about saying hey, that's a fabrication employee or that's a kill employee, right?

A. No, I wouldn't agree with that.

Q. The whole point of your study was to come up with one number for fabrication and one number for kill, right?

A. I do present numbers for fabrication and kill, yes.

Q. And the way you did that is you looked at people and you made a guess as to whether they worked in fabrication or kill, right?

A. I made a decision to classify them as fabrication or [1109] kill.

Q. And based solely on the time of the day or what you thought they had put on, correct?

A. Based on those two factors, the time of the day, the shift started at different times, and the equipment and the equipment is different, so yes, based on those two factors.

Q. The time of the day turned out to be not very helpful because a lot people come in at the same time of the day, correct?

A. There's significant separation for most of the people.

Q. You agree there are kill people in your study who are in the locker room at the same time as fabrication employees, right?

A. Correct.

Q. Okay. So time alone doesn't answer this question, right?

A. No, time alone doesn't. Time gives you some guidance and then with that—within that guidance the analysis of the equipment that they are wearing I think allows you in most circumstances to make the correct decision as to whether they are kill or fabrication.

* * * *

[1140] Q. Let's go to the next page. On the kill side you simply have—four of your six measurements are under a minute, right? Do you agree with that?

A. Four of the minimum numbers.

Q. Yes.

A. When you say my measurements, you are talking about the shortest observed time which is one out of, you know, the whole sample and—

[1141] Q. Right. So pre-shift—

A. Four of them are less than a minute, yes.

Q. Four of them you found somebody took less than a minute to put on their equipment in the department, right?

A. Yes.

Q. You found one that took less than 30 seconds that took off their equipment to go to lunch?

A. Yes.

Q. Somebody else it took exactly 30 seconds to put it back on after lunch?

A. Also true.

Q. And you found somebody that took 12 seconds to put it on—I am sorry, to take off their stuff at the end of the shift, right?

A. Yes.

Q. Okay. Now, let's go back to the first page. For each of these there's somebody who takes a lot longer than that to do the same activity, right?

A. Yes.

Q. And the reason for that is they're not really the same activity, right?

A. They're the same activity, the specific equipment that they don and doff varies.

Q. Right. I am going to come back to this later, but there can be other reasons for the differences here, right?

[1142] A. Yes.

Q. You found somebody who took—let's take .583, you found somebody else who took 10.333 minutes to do that, right?

A. Yes.

Q. How much longer did it take this person (Indicating) than this person? (Indicating) Do you have a calculator there?

A. Sure.

Q. I mean multiple, I don't mean just how many minutes more. How much longer—

A. I do not have calculator.

Q. You do not have a calculator?

A. I had one earlier, but you apparently took it out over the lunch break. Thank you. The answer to the first is about—about 18 times longer.

Q. So this person's (Indicating) 18 times longer or slower, however you want to call it, than somebody else you measured doing the same activity in the locker room for fabrication, right?

A. That's correct.

MR. WIGGINS: Object to the form of the question. It is not the same activity.

THE COURT: Overruled. Overruled. It is cross-examination. You can ask him that.

BY MR. MUELLER:

Q. Let me follow up on Mr. Wiggins' point. Do you agree [1143] with your counsel they are not the same activity, are they?

A. They're the same activity as I've defined them for the study and the content of the activity between the two subjects is different because of the different equipment that they're wearing.

Q. Or different amounts of time talking to their friends, right?

A. Could be that.

Q. Or it could be combing their hair, right?

A. No, the combing of the hair I don't think would have any significant impact so it's really pretty much irrelevant.

Q. Or it could be dancing in the aisles, right?

A. Likewise with that.

Q. Okay. Or it could be sitting on a bench, right?

A. Could be that.

Q. Or it could be standing doing nothing, right?

A. People stand to do nothing from time to time.

Q. All of these things could explain why you have some numbers that are much higher than the short numbers, right?

A. All of them could contribute, but I think most of them are not very important in terms of explaining the differences.

Q. When you told Mr. Wiggins that all your clips are representative, that means that even these short clips are representative as you use that word, right?

A. When I use the term representative, I'm talking about [1144] the group of people who I'm studying and each and every one of these clips represents an individual who did the activity. Some of them stood around,

some of them put on more equipment than others, each of them contributed to the average that I used so their—first representative is used in the context of the sample and second, if it is applied to the individuals, it is—it is representative in the sense that all of them did the activity. It is on film.

Q. Are the short clips representative?

A. The short clips are representative of the individual who performed the—that activity in that way at that time.

Q. Okay. Now, yesterday Mr. Wiggins asked you a question and you said, "Most people cluster around the average." Do you remember saying that?

A. I'm sorry. I was getting a drink. Could you please repeat the question?

Q. Do you remember telling, when Mr. Wiggins was asking you questions yesterday, do you remember saying that, "Most people cluster around the average?"

A. Yes.

Q. Okay. You didn't say that in your report, right?

A. No.

Q. You didn't do any statistical test for that, did you?

A. No, I didn't.

Q. You can check that by putting out a scatter plot chart [1145] and put out a little dot for each observation and you can do that to compare each other?

A. I can do that.

Q. You didn't do that?

A. I don't have to do that. All I have to do is look at the sorted data and it is perfectly obvious from the sorted data.

Q. So you did not do that?

A. No.

* * * *

[1157] Q. Okay. Let's bring up your Table 1, just show it on the screen. This is in Deposition Exhibit—it is Deposition Exhibit 5. I am going to wrap this up. You have 744 different numbers virtually all of which are different, correct?

A. Yes.

Q. You have different numbers for every single person your team measured, right?

A. Yes.

Q. And you have already told me that this is not standardized repetitive work, right?

A. That's correct.

Q. And the reason people take varying amounts of time to [1158] do what you call the same activity is they're not really doing the same thing, right?

A. But this is kind of a word game. They're doing the same activity, but there's a lot of variation within the activity. I will concede that.

Q. Okay. There's a lot of variation, right?

A. Yes.

Q. And part of the reason there's variation is a lot of the people are wearing completely different combinations of clothing, right?

A. No, no, that is not true. The—these people have a lot of commonality when it comes to the—to the equipment that they are wearing to perform their work.

Q. One of the reasons for the difference in times is different combinations of clothing, right?

A. Yes.

Q. And one of the reasons is that they have different personal speeds, right?

A. Different personal speeds, yes.

Q. And some of that may be due to experience, right?

A. Yes.

Q. Some of that I think Mr. Wiggins used the word arthritis, could be due to physical limitations, right?

A. Could be, yes.

Q. Some of it could be just their choice, right?

[1159] A. Could be.

Q. And you even have different times for employees who wear the same clothing, correct?

A. Of course, yes.

Q. And you also observed it takes different amounts of time to wash the same equipment, right?

A. It can be dirtier or cleaner, yes.

Q. And it could be that the employee chooses to spend more time cleaning it, right?

A. Some people are very meticulous, other people are more casual about cleaning things. They're all responsible for delivering clean equipment back to their lockers; but some people as a matter of personality I guess are more meticulous about that, yes.

Q. Employees have different routines for dressing, right?

A. They do, yes.

Q. That's true before shift and after shift, right?

A. Yes.

Q. Now, you also observed that some people would put on their mesh items in the locker room and other people would carry it out, right?

A. Yes, they—there are different combinations of donning in the locker room versus donning in the hallways or at the work site.

Q. So they don't all put on their mesh in the locker [1160] room, correct?

A. That's correct.

Q. And they all don't put on their sanitary items in the locker room, do they?

A. Do you want to list the sanitary items for me?

Q. Let's say frock, they can grab their frock and go put it on out in the cafeteria, right?

A. I didn't see a lot of that. You mentioned that, but I suppose they could.

Q. Okay. And they could put on their hair net out in the cafeteria, right?

A. Again, I didn't see a lot of that; but sure, they could.

Q. And they could put their belly guard and their scabbards on in the department or in the locker room, right?

A. Yes.

Q. And some employees might put on their—some of their sanitary items before they put on their unique knife-related items, right? You can put on your hair net—

A. Yes, I was just thinking a little bit, yes, the answer is yes.

Q. All that is true in reverse at the end of the shift, right, you can take off your mesh items and take off your hair net last, right?

A. I don't think you can take your mesh off last because [1161] usually you have to verify that it is clean, you have to do some cleaning on the mesh.

Q. I said it the other way around, you can take off your mesh and then take off your hair net, right?

A. Yes.

Q. And you could—the last thing you do could be taking off some sanitary item like the hair net, right?

A. That could be, sure.

Q. And you don't know why people do it in all the different places they do, right?

A. No, not—no, I don't.

Q. You just know there's variation, right?

A. Yes.

Q. And in addition to all that, different employees spend different amounts of time talking to each other or doing personal activities, right?

A. Yes.

Q. So what we've learned from your study is that everyone has different times and there could be all kinds of reasons for that, correct?

A. Yes. We've also learned from my studies that there is–

Q. You have answered my question.

A. Yes.

Q. You have no way of knowing why everyone is different, [1162] do you?

A. Sure, I have ways of knowing what accounts for these differences.

Q. It includes differences in equipment, right?

A. Yes.

Q. Differences in physical abilities?

A. Yes.

Q. Differences in choices?

A. Yes.

Q. And differences in personal activities interspersed between what you measured, right?

A. Yes.

* * * *

[1163] Q. For these activities that Mr. Mueller says are so different for all these different reasons, what does Tyson pay for those activities?

A. Four minutes.

Q. Does it change it from one person to another?

A. No.

Q. If it had a time clock, a punch clock, would that enable it to treat different people in different ways?

MR. MUELLER: Objection. Beyond the scope of his report. Not disclosed.

THE COURT: Overruled. Answer the question.

THE WITNESS: There are alternatives I've witnessed in other plants, yeah, there are different ways you can pay people for this activity.

* * * *

[1164] Q. Now, you said there was—a minute ago there's a lot of commonality in the items people wear. What do you base that on?

A. Well, I've seen reports that list the—list the items that people wear by job classification.

Q. All right. And have you—what did you learn from that?

A. What I learned is that 92 percent of the people wear the Plexiglass cuff, 91 percent of the people wear mesh gloves, [1165] 88 percent of the people wear—use the steel, about 63 percent of the people wear Polar sleeves, about 60 percent of the people wear Polar gloves, 84 percent of the people wear belly plates.

Q. How many? What number did you say?

A. 84 percent and—so there's, you know, there is a lot of commonality in terms of the equipment.

Q. Now, you have told us that you had 744 clips, correct?

A. Yes.

Q. And we've been calling those sequences and we have seen a lot of them, correct?

A. Yes.

Q. All right. Now, of those 744 clips, how much time are there observations on those clips?

A. 1,551 minutes.

Q. How many seconds is that?

A. 93,060 seconds.

* * * *

[1166] Q. What is the likelihood that someone talking to a friend for 10 or 15 seconds would affect your averages given that you have 93,060 seconds?

A. Well, the impact on the averages would be very, very small.

Q. Just to change—let's take the fab department. You said 18 minutes was the average. Just to change the fab department by one minute, to lower it to 17 minutes, how many seconds would it take for you to throw out?

A. Well, it would take about—let me—about—probably about 5,000 seconds.

Q. And what do you base that upon?

A. To lower it by one minute is five—approximately 5.6 percent reduction. In other words, to move from 18 minutes to 17 minutes, that's about a five percent reduction in time so if I apply that same five percent reduction to the 93,060 seconds, that's, you know, I can do the exact numbers for you, but it is ball park about five to 6,000 seconds.

* * * *

[1170] Q. Now, we were talking here at the board about what it would take to move these numbers, move these averages by a minute and we had established that it would take around 5,000 seconds to come out to move it one minute. How many minutes is 5,000 seconds?

A. 83.33 and a third minutes.

Q. 83.33?

A. Yes.

[1171] Q. To change the average by one minute, correct?

A. That's correct.

* * * *

[1176] Q. Let me go about this a different way. In the industrial engineering--you can take that down—field, is there a way to decide when you've got outliers?

A. You can perform statistical tests to determine whether there are outliers.

Q. And Mr. Mueller had asked you about that and when you—tell us how that—first of all, have you performed that test?

A. Yeah, I performed the test called the 1.5 IQR test, it is a common test used, that is used for identifying outliers and base—

Q. Okay. Now, did you, in fact, through that test identify what is called outliers?

MR. MUELLER: Objection. Your Honor, this is undisclosed expert report testimony. It was not in his report and it was not in his deposition. He is talking about something he's done since discovery.

[1177] MR. WIGGINS: It is direct—he was asked about it, several questions.

THE COURT: Overruled. Answer the question.

BY MR. WIGGINS:

Q. Did you—

A. Yes, I did, I identified the outliers and I determined what impact they would have on the overall average times.

Q. Okay. And if you were to take each of those outliers identified through that test, the 1.5 IQR test, how much effect would it have on the kill department?

A. On the kill department, it would reduce the average by .4 minutes from about—from 21.25 to about 20.83, 8384.

Q. Four minutes is—

A. A little bit more than .4 minutes.

Q. What is .4 minutes?

A. .4 minutes is 24 seconds.

Q. 24 seconds. All right. You threw out all the outliers, that could be identified through the standard test, you would reduce the time 24 seconds?

A. That's correct.

Q. And in the fab department, if you were to take all the outliers, cut 100 percent of them out, what effect would it have?

A. The impact was larger in the fab department, the total impact was over one minute. It dropped the average from 18 [1178] minutes down to 16.73 minutes.

Q. Okay. And tell us how industrial engineers calculate the 1.5 IQR test to spot outliers and their effect.

A. The—the test—this is a little bit complicated. You take each of the activities and you sort them from small to high and then you find the middle observation, the median observation and then you take the bottom half and divide it in half. That identifies the first quartile and you take the top half and divide it in half, that identifies the third quartile. The difference between the third and the first quartile is the IQR, the interquartile ratio. Multiply that by 1.5 and then add it to the third quartile and any number in the sample that's larger than that is an outlier.

Q. All right. Now, let's look at Mr. Mueller's table that he put on the board, I don't remember the name of it. Remember the one that said wide variances? The one he showed you this afternoon. Do you remember this?

A. Yes, I do.

Q. Now, first of all, let's get it oriented. When we look at the first line as an example, pre-shift don equipment at locker, when we see a .583, is that a single person or is that an average?

A. That's a single person.

Q. When we look at 10.33, is that a single person?

A. Single person.

[1179] Q. All right. So he's taken the—one individual that's the shortest and one individual that's the longest apparently, correct?

A. That's correct.

Q. Now, the one 1.5 IQR, can it identify whether or not either one of those are outliers?

MR. MUELLER: Objection. Leading.

THE COURT: He said can it. Overruled.

THE WITNESS: Yes, it can. When you apply the test, you can determine whether there are outliers and you can determine whether these individual observations are outliers.

BY MR. WIGGINS:

Q. Okay. And did you, in fact, determine that one of those two in the fist line is an outlier?

A. I determined all of the outliers, I identified all of the outliers.

Q. Okay. Were all of them outliers or just some of them?

A. Oh, just on this—on this sheet right here?

Q. Yes.

A. Just some of them.

Q. These are 16 people, correct, on this chart?

A. That's correct.

Q. I want to—first let's get the—take the first line. Which one of those two, or maybe both, did you determine are outliers under 1.5 IQR?

[1180] A. I can—of the first two, my recollection is that the long observed time, the slow time was an outlier. None of the short times were outliers.

Q. Okay.

A. That's the problem with the test. It identifies on this kind of data slow times that are outliers, but it doesn't really identify any short times.

Q. And if you don't identify short time outliers, who—to whose advantage is that? The company or the employees'?

A. Well, it takes out the slow times and it leaves in all of the fast times so that's in the company's interest or to the advantage of the company.

Q. Now, we are going to come back to that problem with the test, but at least as a test of throwing out the longer times, that would be the right-hand column. Which one of these, if you recall, eight individuals were determined to be outliers?

A. Well, the 10.333 was an outlier; the 9.267 was an outlier; and the others I honestly—I would have to go back to the analysis and look at it to tell you which the—which the—I believe there was at least one additional outlier, but I don't recall which one it was.

* * * *

[1203] Q. Now, if you—if someone were to take your tapes, could they, if they wanted to, such as the Tyson industrial engineers, break out elements as you did in those two cases?

A. Yes, I think—and people have done that in, you know, past cases that I've been involved in, the company has hired engineers to come in and frequently they will take my data and re-analyze it.

* * * *

[1215] Q. And you were asked some questions about taking out—not just in the Kraft case, but generally under industrial engineer principles, taking out certainly personal time activities. I think Mr. Mueller mentioned getting a drink of water and things like that. Do you recall that testimony?

A. Yes.

Q. Okay. Now, under the principles of your profession, if you take out personal time, do you put back in anything in replacement of it?

A. Yes, you do. When we talk about taking out time, basically what you are saying is that you isolate the time for those personal activities that occurred during a study and in computing the work time, you don't include those personal times. You arrive then at a kind of pure work time which industrial engineers refer to as normal time; but then to make that normal time fair, the engineer adds what is called allowance time and allowance time, you know, I have mentioned before, is time for personal needs, time for making up for time that you lose because of unavoidable delays and time for fatigue to overcome the fatiguing aspects of work so all of that is added back in again.

Q. All right. And is there a standard that industrial engineers use to account for these type of what I would call intangibles?

A. Yes, the textbooks will all have a chapter on [1216] allowance, every one of these textbooks that we have mentioned, and they will talk about the importance of including the allowance in the standard time and they generally will mention in percentage terms, you know, approximately how large those allowances would be or at least some comment on the range of allowances that are typical in industry.

Q. All right. And what is that range?

A. Oh, you know, it depends on the textbook, I think most of them will cite figures between 10 and 15 percent and they will also talk about the need for more

allowances if the work demands it or less if the work is particularly less demanding.

Q. All right. Let me show you just one example that I happen to know about. I don't know all these texts, but I saw this, we looked at it earlier. This is the one that we were reading from before. Look at the last paragraph. It says, "In general, a fair day's work is one that is fair to both the company and the employee. This means that the employee should give a full day's work for the time that he or she gets paid, with reasonable allowances for personal delays, unavoidable delays, and fatigue," correct?

A. That's what I'm talking about, yes, it is the adding back—that time back in.

Q. Now, in your professional experience and opinion, how much time should be added back in if you are going to take these other things out that Mr. Mueller wants to take out?

[1217] MR. MUELLER: Objection. I think he is really getting at a legal conclusion for the jury.

THE COURT: Absolutely. This is—this is in an industrial engineer's textbook and I don't have any problem with him having it in a textbook, but now this is my area is to tell you what the law is and what industrial—they tell industrial engineers in college or in the workplace about—about what is fair in terms of compensation is not the standard here. The law says specifically and you will get more than enough instruction on what the law says is permissible for compensation. Objection sustained.

BY MR. WIGGINS:

Q. But let me ask you this question from a standpoint of just strictly the time study of the type we have

here today. If we're going to take out those 24 seconds and those 76 seconds on that board right there, under the principles of your profession should we put back in the allowance time?

A. Yes, we should.

Q. And how much time in your opinion should we put back in?

A. Well, it would be much larger than the 24 seconds and the 76 seconds on the board. Typically what would go back in is about 10 percent of the work time, pure work time.

Q. Did you say a percentage? I didn't hear you.

A. 10 percent.

[1218] Q. 10 percent. How much would 10 percent of 18 minutes be?

A. 1.8 minutes.

Q. And how much would 10 percent of 21.25 minutes for the kill department be?

A. That would be, you know, 2.125 minutes.

Q. Did you—did you do that in this case, did you—the word was used charge to the company, did you charge to the company that type of add back in time?

A. No, but I didn't take the time out either in fairness.

Q. And in your opinion what effect do those two items have on each other?

A. Well, you know, I think if I had taken all the items out and then put 10 percent back in again, I would end up with times that are larger than 21.25 and 18.0.

* * * *

[1234] Q. Yesterday you had told us about the industrial engineer's way of identifying outliers and we had talked about it there on the board. I want to go back to one question on that that I overlooked. You referred us to the fact that 1.5 IQR has a bias to it of some kind. What were you referring to?

A. What I was referring to was the fact that a test like this would favor the company in applying to this kind of time study data and the reason for that is that the test eliminates outliers among the slow subjects, but it doesn't among the fast subjects so it is cutting off one end of the distribution, but it is not really cutting off the other end.

* * * *

[1261] LIESL FOX,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as [1262] follows:

EXAMINATION

BY MR. WIGGINS:

Q. Good morning.

A. Morning.

Q. State your name, please.

A. Liesl Fox.

THE COURT: Get a little closer to the microphones and you can pull them your direction. That will help.

BY MR. WIGGINS:

Q. Ms. Fox, Mrs. Fox, can you give us your educational background?

A. I have a Bachelor's Degree in mathematics and a Master's and a Doctorate in biostatistics.

Q. All right. And when did you receive your Ph.D. in biostatistics?

A. In 1997 I believe.

Q. From what institution did you receive that Doctoral Degree?

A. University of Alabama at Birmingham.

Q. All right. And when did you receive your degree in mathematics?

A. 1992.

Q. All right. And what—what has been your career since receiving your Doctoral Degree in biostatistics?

[1263] A. I'm a statistical consultant at Quantitative Research Associates.

Q. And how big an outfit is that?

A. It's small, it is my employer and myself.

Q. You're an employee?

A. Yes.

Q. Okay. And what do you do in your job?

A. We do a lot of statistical support, we do a lot with legal work, we do some other medical or—not medical, but other research support as well.

* * * *

[1264] Q. Okay. And did I ask you to help us with handling Tyson's database of their employment records for this case?

A. Yes.

Q. And did you do that?

A. Yes.

Q. And what databases did you give us help with in handling?

A. In this particular case I was given punch data records and pay records.

Q. All right. Punch data, are you talking about time clock, punch in, punch out?

A. Yes.

Q. Payroll records, what type of records did you have there?

A. That particular database had the departments and the job codes that were being worked, the particular code regarding the type of work that was being done, whether it was regular work, a meeting, a training shift or whatever, it had a time on it, the start time of each specific task that was done during the day, it had pay rates. There may have been some other [1265] fields, but those—I think those were what I was concerned with.

* * * *

[1266] Q. What did you do?

A. I was asked to compute damages for uncompensated time worked.

Q. Damages being backpay?

A. Yes.

Q. Did you include anything other than pay?

A. No.

Q. All right. And tell us how you went about calculating [1267] backpay.

A. Well, for each individual there's a definite liability period depending on the class that they're in so for during that liability period I would look at the number of days that they actually worked during the week, I would use an estimated amount of off-the-clock time worked per day or per shift. When I had that totaled for the week, I subtracted off the amount of K-code time that had already been paid to the employees that was shown in the pay database and came up with a total amount of uncompensated time worked.

Q. Okay. So essentially it sounds as if you built a database that would tell us which days people worked and how much they got paid for those days?

A. Correct.

Q. All right. Now, did you do that on a person-by-person basis?

A. Yes.

Q. Did you do it on a day-by-day basis?

A. Yes.

Q. If a person was absent on a particular day, did they get—did that day get included in their backpay?

A. No.

Q. Did you do it on a week-by-week basis in terms of which weeks they worked over 40 and which weeks they worked under 40 hours?

[1268] A. Yes.

Q. Let's say they came in on Monday and were absent the rest of the week, they just had an eight or nine-hour day, did they get any backpay for that week?

A. No.

Q. Now, you said you then used the company records for K-code. What is K-code?

A. It's a specific line item in the pay data, it is paid only on Saturday of the week, the cost code is the letter K in the data and it is my understanding that that is to compensate for I guess the donning and doffing that's relevant in this case.

Q. Okay. And once you used the company data to figure out which days people were at work, which weeks they worked over 40 or under 40, what did you do next?

A. Well, I would have—since I only used what was overtime, I would have multiplied that remaining amount by their time and a half pay rate for overtime rate of pay and then I just added it up for each person, came up with the total amount of damages.

Q. So the K-code was the actual amount of time—of pay that was paid each week to a particular person?

A. In the pay data, yes.

Q. And that came directly from Tyson?

A. Yes.

[1269] Q. You didn't have to do anything to that element, did you?

A. No.

Q. And the days that they actually were at work or absent, did you have to do anything other than that other than take Tyson's records at face value?

A. No.

Q. And for the weeks that they worked over 40 hours or under 40 hours, did you have to do anything other than just take Tyson's record and use it as is?

A. That's correct, I used specific cost codes for that, I think that there were—there were some cost codes, you know, like holiday pay, there were certain cost codes that indicated they were not actually at work on the job.

Q. From Tyson's own records were you able to tell how much to subtract as already having been paid?

A. Yes.

Q. Now, how did you determine the other side of the equation about what they may should have been paid?

A. I did that with specific departments, it was limited to what is being called the kill and the fabrication departments, and then there were specific job codes within those departments that had to have been worked so using those specific departments and specific job codes, I applied the estimated off the time—off-the-clock amount of minutes.

[1270] Q. Where did the estimated off-the-clock minutes come from?

A. Dr. Mericle.

Q. All right. And what amounts of time did you use on that side of the equation to see—to compare what they should have been minus what they were paid?

A. I believe it's 18 minutes for fabrication and 21 and a quarter for the kill department.

Q. All right. Did—were you able to determine from Tyson's own records which employees Tyson had determined to be eligible for these type of pre-shift and post-shift donning and doffing payments?

A. Not exactly. K-code time in the pay data is recorded only on Saturday and it is recorded as a lump sum so I—I did not know specifically which day or which job they were being paid for, I just assumed that they were being paid for the gang time jobs in the appropriate departments.

Q. And was there a period of time where the payment was a flat rate for everybody that was eligible for K-code that did donning and doffing?

A. Yes, that was prior to February of '07 I believe.

Q. And what was that amount that was a flat rate?

A. That was four minutes.

* * * *

[1271] Q. All right. Now, the 3,344, that covers all the employees at the plant that are paid by gang time and are subject to the practice at issue in this case?

A. Well, that's—it's limited to people who worked a gang time job so at least one shift they worked a gang time job within that specific liability period, I can't remember, 2005 to 2007 or something like that, they had to have worked at least one gang time job during that period of time.

[1272] Q. Okay. These 3,344 all satisfied that test?

A. Yes.

Q. All right. And has the company now checked your work and agreed that that is the correct number of people?

A. I have not heard otherwise. I assume so.

* * * *

[1275] Q. And let me show you just one page of a many-page exhibit just so we are on the same page. This is page one for [1276] the FLSA class. It gives person by person and amount, correct?

A. Correct.

Q. And for example, the first person, Jose D. Acevedo, $220, then it goes on up, correct?

A. Correct.

Q. For that particular group did you limit them to persons that made—that their backpay was of a certain magnitude or amount?

A. Yes, damages were only awarded if they would receive at least $50.

Q. At least $50. Okay. Let me show you the last page. Well, I won't do it. This is not sorted. So from this work you did you were able to determine for particular people what their loss was?

A. Yes.

Q. And tell us the types of variables that would cause some people to be on the low end and other people to be up on a higher end of the backpay amounts.

A. Part of it is length of time that they worked. Obviously if they only worked a couple weeks, they would not be entitled to much in the amount of damages. Damages are only eligible to be computed if they—if it would put them into overtime so if even adding this extra uncompensated time did not result in over 40 hours for the week, then they would not get damages for that week. They had to have worked at least close [1277] to a full-time week to get damages and obviously the more—the more gang time jobs that they worked

during the week, the more uncompensated time would be added to their total.

* * * *

Q. Now, taking the total amount, not the individual amounts, but the total amount, when you put all the individuals that are eligible together for the Iowa class, what backpay did you calculate?

A. Six point—$6,686,082.36.

[1278] Q. How many cents?

A. 36.

Q. All right. Let me show you the summary—what is the next number, 345—table. Are these the results of your calculation based on the method you told us about?

A. Yes.

Q. All right. And you—I notice that you said number in the Iowa class is 2,850. Why is that less than 3,344?

A. Because that—that subtracts off the people that would not get any because they would have received less than $50.

Q. Even using Dr. Mericle's times they would receive less than $50?

A. It—well, yes.

* * * *

[1279] Q. And did you include interest?

A. No.

Q. So this is just the pay itself, correct?

A. Correct.

Q. Now, in doing this, did you have to build a computer program in order to run the calculations for you?

A. Yes.

Q. And have you shared that program with the company?

A. Yes.

Q. And are you able from your program to simply change the assumption based on Dr. Mericle's times?

A. Yes, if it is to be applied to areas overall such as on fabrication or kill.

Q. Now, let's just take a hypothetical. Let's say that someone were to say well, I think 18 minutes is not the right number, but I think 15 minutes is about the right number just to [1280] pick a number out of the sky. Is your program able to substitute 15 for 18 and then give us the new number?

A. Yes.

Q. And is that—how long would it take to refigure if you changed that one variable?

A. Running on a laptop, probably about 10 minutes.

Q. All right. And just so we don't have to do it here in the courtroom, have you done that 10-minute exercise at a lower amount of time than 18 minutes and 21 minutes?

A. Yes.

Q. Let's take the example I just gave you. Have you already checked to see what the backpay would be if someone were to just pluck out of the sky 15 minutes for fab and less than—six minutes less for kill?

A. I actually did 15 minutes for both fabrication and kill together.

Q. Okay. And what backpay did you get when you your formula ran that?

A. For the Iowa class, it's $4,903,621.51.

Q. All right. I am not good at writing these numbers down. Four million, what?

A. 903,621.51.

Q. All right. And for the FLSA class?

A. $1,184,227.26.

Q. All right. Now, is the formula and the data used in [1281] applying the formula exactly the same whether you run a 15 minute or an 18-minute calculation?

A. Yes.

Q. Is it exactly the same if you ran a 15 minute and a 12-minute calculation?

A. Yes.

Q. Any number you plug in on the right-hand side of the equation, the should-have-been side, the formula just automatically changes person by person?

A. Yes.

Q. And let's just take the 15-minute calculation that you did as an example. Does it automatically print for you a person-by-person list of the amount each person gets based on the days they worked and the weeks they worked over 40?

A. Yes.

Q. And even that part of it, doing several thousand people's calculations with a new number, that just takes about 10 minutes?

A. Yes.

Q. And do you have that formula and that data that allows that calculation to be made in your computer?

A. Yes.

* * * *

[1283] Q. Is this Exhibit 346 looking at just that one [1284] component, the walking component?

A. Yes.

Q. What was the backpay just for that one subpart?

A. For the Iowa class $413,434.71.

Q. All right. And then the FLSA class was?

A. $127,895.91.

Q. And again, there's overlap between those two, correct?

A. Yes.

Q. You don't just add them?

A. No, you cannot add them.

Q. But your list of individuals is the amount for that individual whether they're in the Iowa class or the FLSA class?

A. Correct.

Q. Is that true for your first calculation, the six million—$6.6 million calculation?

A. Correct.

Q. This type of calculation that we're looking at where you just take out a single component or subpart, can that be done for any other subpart of the overall calculation?

A. I believe so. It could be. It depends on what you are asking how the code would work; but yes.

Q. What if someone wanted to calculate the backpay just for the pre-shift and not the lunch period? Could you take the minutes from Dr. Mericle or from any other source and simply use [1285] those minutes and run your formula in the same way?

A. Yeah, that would just be changing the number of minutes overall so yes.

Q. Would that be the type of thing where you said it would take about 10 minutes?

A. Yes.

Q. And that again would give us a person-by-person amount?

A. Yes.

* * * *

[1301] MR. MUELLER: I want to pull up Defendant's 2272 which is her Deposition Exhibit 54.

Q. So this is your original list that I resorted before you took out people under $50, correct?

A. That was—that was after—this is after my report, but before I removed $50?

Q. That's correct.

A. Okay.

Q. Your original list of individual damages just sorted from lowest to highest. Do you remember we talked about this in your deposition?

A. Yes.

Q. Okay. You agree it was correct?

A. Yes.

Q. Let's go down your original list before Mr. Wiggins [1302] told you to cut out the people under $50 and I think we can clarify that my question about how many people would have gotten zero even before Mr. Wiggins told you to cut them out, let's go down to the first person who gets anything. I think I had my number slightly wrong. I said around 295. I think—let's see if it is around 211 people. Right there. Let's stop. Do you see at line 213 we see Akur Guang?

A. Yes.

Q. That means the first row is—numbered row is the header, correct?

A. That's correct.

Q. That means the first 212 people on your list—

A. Yes.

Q. —they would have gotten zero even assuming all of Dr. Mericle's numbers and everything else the Plaintiffs say, right? Correct?

A. That's correct. It would not have been enough to kick them into overtime.

Q. What you saw when you ran your numbers was that Mr. Guang, even if everything the Plaintiffs say is true, would have won 27 cents in this case, right?

A. That's correct.

Q. Okay. And you saw that Randy Guevara, even if everything Dr. Mericle said and everything else the Plaintiffs said is true, would have gotten $1.35, right?

[1303] A. That—that's correct, yes.

Q. The same with Michael Grimes, right?

A. That's correct. Now, this—let me say, you know, this is dependent, of course, on them being moved into overtime when I add this additional uncompensated time and remember that I am subtracting off what they have already been paid in K-code time.

Q. I understand.

A. As I discussed in my deposition, that I don't know the specific jobs that they were paid K-code time for, but it appeared from the data that they were being paid K-code time for departments or jobs that were not relevant so I am subtracting off everything they have been paid for the week potentially for jobs that are not at issue here.

Q. I understand. What you are saying is that we owe even if everything the Plaintiffs say is true, this would suggest according to your calculations we shorted a guy named Mr. Guang by about a quarter, 27 cents, right?

A. At least, yes.

Q. This would suggest that we fully paid Michael Grimes, but if you accept everything Dr. Mericle says, we shorted him a buck 35, right?

A. Yes.

Q. Okay. And these are your numbers, right?

A. Yes.

[1304] MR. MUELLER: Your Honor, we move in Defendant's 2272, just this chart.

MR. WIGGINS: No objection.

THE COURT: Received.

BY MR. MUELLER:

Q. Does that perhaps explain to you now why Mr. Wiggins cut out all the people under $50?

A. I don't know his reasoning. It could be. I don't know.

Q. It didn't strike you as a reason?

A. He has to make the decision, not me.

Q. Okay. Now, you can take that down. I want to talk about the data you considered in making these calculations because Mr. Wiggins asked you about it. You looked at our payroll information, right?

A. That is correct.

Q. You did look at our punch in and punch out information, right?

A. Yes, I did look at it.

Q. You considered Dr. Mericle's estimates of the average time employees in kill and fab spent on donning, doffing, washing, and walking, right?

A. That is correct.

Q. And by the way, do you know yourself whether anybody performed any off-the-clock work for which they were not already [1305] paid?

A. No, I do not.

Q. Okay. So for purposes of what you are doing, you are just assuming people worked overtime off the clock without being paid?

A. I was asked to make that assumption, yes.

Q. So you don't know the actual amount of donning and doffing for anybody in your charts, correct?

A. No, I do not.

Q. You were just asked to assume Dr. Mericle's averages?

A. That is correct.

Q. And I heard you say to Mr. Wiggins when he was just asking you questions that our pay data includes, you said, each specific task during the day. You didn't mean our data shows you actual donning and doffing time, did you?

A. No, it shows—it shows different job codes so if they started at one job code and went to a different job code, it would show that.

Q. Okay. Now, one of the things Mr. Wiggins sent you before you ran these numbers was Dr. Mericle's report, correct?

A. That is correct.

Q. And you looked at that, right?

A. Yes.

Q. And you understand that he was using a sampling approach to develop his numbers, correct?

[1306] A. Yes.

Q. And you then plugged those numbers into your formula, right?

A. That is correct.

* * * *

[1307] Q. Did you do anything to evaluate the validity or the reliability of Dr. Mericle's work?

A. No.

Q. You were just asked to use his numbers?

A. That is correct.

Q. Who told you to do that?

A. Mr. Wiggins.

Q. Do you have any independent information as to whether Dr. Mericle's times are accurate?

A. No.

Q. Have you reviewed any of Dr. Mericle's videotapes?

A. No.

Q. If the jury rejects Dr. Mericle's numbers, then your big calculation, the $6.6 million number is invalid, correct?

A. That is correct.

Q. Okay. Now, I want to talk about the K-code because you said you gave us credit for that, right?

A. Yes.

Q. How many total records did you receive from Tyson?

[1308] A. I don't recall. I would have to go through the code and look.

Q. I think you can look at your report. Do you have it up there? Do you have it in front of you?

A. I can get it. All right.

Q. If you could go to the bottom of page four and the top of page five.

A. Okay.

Q. According to your own report, you received over three million pay records, right?

A. That's correct.

Q. And of that, over 2.2 million pay records related to what you called a single work-related event for the day, right?

A. That's correct.

Q. What does that mean?

A. Well, like I said, they can go from one job code to another and so when I was looking at this particular paragraph, I was looking at how many people would have just punched in, worked one job code, and punched back out again.

Q. Okay. So at least several million pay records that we maintained you looked at, right?

A. Yes.

Q. Okay. So you agree we at least maintain those records, right?

A. Yes.

[1309] Q. All right. Now, do you agree that the data Tyson gave you was sufficient to make the calculations you wanted to make?

A. Yes.

Q. And you knew from some prior work involving that Lexington, Nebraska, plant, you knew how to read our payroll data, right?

A. Yes.

Q. And so you knew that the K-code was payment Tyson was already giving for donning and doffing time, right?

A. Correct.

Q. And you were able to determine from the data that Tyson had a policy of paying for donning and doffing activities, right?

A. That is correct.

Q. Okay. In fact, you said at the bottom of your report, I would like to read this, see if it is still your opinion, take a look at the bottom of page six of your report.

A. Okay.

Q. You wrote, "While Tyson Foods has been paying K-code time to certain production employees since 1998, the group of production employees who were awarded K-code time and the amount of K-code time awarded has varied." Is that what you wrote?

A. Yes.

Q. And you still stand by that opinion, right?

A. Yes.

* * * *

[1321] Q. Okay. Now, before February of 2007 you calculated back wages wages by department, correct?

A. That is correct.

Q. And that's because whole departments were getting paid the K-code, right?

A. Correct, everybody that worked within the department received those four minutes.

Q. Basically it was the production departments that got the K-code, right?

A. That's correct.

* * * *

[1331] Q. Did you ask Mr. Wiggins to give you information from any of those people about how much they thought they each worked putting on donning and doffing clothing?

A. No.

Q. Okay. So instead what you just did is you assumed one [1332] lump sum number for fab and one lump sum number for kill, correct?

A. That's correct.

Q. And that's an assumed amount of time, right?

A. That's correct.

Q. And by the way, you looked at Dr. Mericle's report, correct?

A. Yes.

Q. And do you remember in your deposition you told me you never have looked at his table with all the different time measurements just for the 744 people he did look at?

A. That is correct.

Q. Okay. And so the reason you plugged in these flat numbers is because Mr. Wiggins told you to do that, correct?

A. That's correct.

Q. Okay. And one reason I think you told me you plugged in these averages is because Tyson's payroll system doesn't track the amount of time each employee spends donning and doffing, correct?

A. That's correct.

Q. I mean, it is just not in the punch or pay data, correct?

A. That's correct.

Q. But another reason you did this is so you didn't have to input a separate number for each employee, correct?

[1333] A. Well, I mean, it certainly could be done. It would be very time consuming, but it could be done; but I wasn't asked to do that.

Q. Right. But isn't that why you told me you used an average, to avoid having to input a separate number for each employee?

A. I don't know that I said that. I believe I said I couldn't use the punch data. I don't know that I said I couldn't use a number for each person, but that would be very time consuming.

Q. Okay. So you didn't do that, correct?

A. No, I did not do that.

Q. Okay. Now, if an employee worked less than Dr. Mericle's average numbers up here, (Indicating) it is possible that Tyson's K-code payments already could have fully paid them for that time, right?

A. Potentially.

* * * *

[1350] Q. Thank you. Now, you also are not offering to the jury any calculation for non-knife users, correct?

A. No, I am not.

Q. Okay. So if the jury thinks that the people who wear the knife-related equipment were fully paid, you don't have any number that would be the damage for people who just wear the standard items like a hard hat, do you?

A. No.

Q. Now, Mr. Wiggins said there's a lot of programs on your computer and I want to ask you some questions about it. The way you did this originally, you had basically one all-in total for fabrication and one for kill and then you just told us who would get that money, right?

A. That is correct.

Q. That is, it was entirely based on Dr. Mericle's original numbers for fabrication and kill, right?

A. That's correct.

Q. And do you remember telling me you can't just take a fraction or a portion of that because as you go down in numbers, people—I think you told Mr. Wiggins this this morning—you start finding that people start dropping out of overtime, right?

[1351] A. That's correct.

Q. So if somebody was at 41 hours, let's say 40 and a half hours, and you took out an hour because let's say the jury concludes that work didn't take as long as Dr. Mericle said, a lot of those people would fall into non-overtime, correct?

A. That's correct. I don't know how many, but yes, some would.

Q. So you can't just take your original $6.6 million number and say well, we are going to cut it in half if we find Mericle's numbers are overstated by twice or let me put this a better way.

If the jury were to say no, Dr. Mericle's numbers are wrong, it is only half that, you can't just take half of your $6.6 million, can you?

A. No, you cannot.

Q. Right. And the lower and lower the number of minutes goes, the more and more people start falling out of overtime, right?

A. That's correct.

Q. So at some point if you drop the number low enough, you would expect that people would be at zero on your chart, right?

A. Some people would, yes.

Q. Okay. Well, anybody whose K-code time covers the amount of time the jury thinks should be paid would be a zero, [1352] right?

A. That's correct.

Q. Okay. So, for example, if the jury concludes the activities take five minutes, you have no idea what kind of back wage calculations would result, right?

A. Not at this time, no.

Q. You have not done a five-minute calculation, have you?

A. No, I have not.

Q. And the way your model was originally set up, it was all or nothing, right?

A. Yes, you just plug in those area numbers, yes.

Q. Yeah, meaning if the jury—originally the way you did this if the jury rejected Dr. Mericle's numbers, there was no back-up calculation, right?

MR. WIGGINS: Objection, Your Honor. That is not—we object to that on the basis that we argued yesterday.

THE COURT: Overruled. Answer the question.

THE WITNESS: The code that I originally provided you was I believe set up as a macro so the numbers could be changed in that one line of code if that is what you are asking.

BY MR. MUELLER:

Q. That is not what I am asking. You didn't run any alternative to that all-in $6.6 million number originally, correct?

A. No, I did not.

[1353] Q. Do you remember telling me in your deposition it was basically all or nothing?

A. I mean, if that's what the number is.

Q. No, but do you remember telling me that?

A. If what you are getting at is can you come up with a number based on different estimates, then no, it has to be what is on that chart. It would have to be recomputed.

* * * *

[1365] Q. Let's look at this chart first, Dr. Fox. Has Tyson and its expert, Dr. Nickerson, had all of your data and your algorithms, formulas, since at least July of this year to run anything it wants to run?

A. Yes.

Q. Could it have run every one of these things itself in July of this year?

A. Yes.

Q. Let's go to the prior chart, I have never seen these charts so I am going to have to borrow yours, look at where it says late July 2011, Dr. Fox revises

her class list and back wage calculations and that occurred after your July 1st report?

A. Correct.

Q. Why did you change in late July?

A. Right before I did my report on July 1st I received a chart showing gang time jobs. My original report computed damages for anything in the fabrication and kill departments, I received this chart saying that only these specific jobs were at issue in this case so I had to revise my computations based on those specific jobs.

Q. You received—I'm sorry. Go ahead.

A. I then got a chart from Dr. Nickerson with his class list saying these are the people that should be at issue in the [1366] case. I compared that with what I had already done and with the gang time jobs and came up with what I determined to be the class list people who had worked a gang time job at least one day or one shift within their specific liability period.

Q. So of that new data that you got from Dr. Nickerson, partly did the remainder of it come from Tyson?

A. Yes.

* * * *

[1367] Q. So is there anything at all that their expert, Dr. Nickerson, could not do as of July 1st that you have done since July 1st?

A. No.

Q. All right. Now, to this day has Dr. Nickerson given you even one of his backpay calculations? Just one?

A. No.

* * * *

[1368] Q. Has he ever sent you anything else that he asked you to incorporate or change?

A. Other than the report which I read shortly prior to my deposition, he talked about—again he talked about the people, but that was resolved with the class—the revised class list and he talked about the gang time jobs I believe. I would have to look through his report again; but he—in his report he did not take issue with my methodology.

Q. And the things that he gave you about the class list [1369] that you have told us about, did you accept what he gave you and incorporate it in your calculations?

A. Yes.

* * * *

Q. Now, Mr. Mueller asked you several times about yesterday's use of an outlier method by Dr. Mericle to reduce his times and he seems to want you to do that. In fact, that was on the list.

MR. MUELLER: Objection to commentary.

THE COURT: Just pose a question, please.

BY MR. WIGGINS:

Q. I want you to take what you testified to we wrote on the board, one is 24 second change. Can you see that?

A. No.

Q. Can you see it now?

A. Yes.

Q. I want you to take this 24 second change where he went from 21.25 originally his number, he reduced it to 20.83 and the [1370] 76 second change in which he went from 18 minutes to 16.73 minutes. Take those two, plug them in your formula, and tell us what the backpay is.

A. It will take about 10 minutes.

Q. All right. Have you now changed the variables and it is running?

A. Yes.

* * * *

[1373] Q. It is done? All right. Let's write it down. What is the backpay on Dr. Mericle's reduction yesterday?

A. For the FLSA class—do you want Iowa first? I can give you Iowa first.

Q. Let's do Iowa since I stacked it that way.

A. The Iowa class would be 6,198,191.67.

Q. All right. What does the FLSA number come to?

A. It is 1,490,652.35.

* * * *

[1375] Q. Now, looking at the low end of that range that Mr. Mueller asked you questions about, I think he showed someone got 15 cents, one person got a dollar 35 before you put in the $50 rule. If someone got as little as 15 cents or 27 cents, I can't remember, what does that indicate about how long they worked at the company?

A. Well, I would have to go back and look, but they—they wouldn't have worked very long. I mean, I

could certainly look up someone's records, but to get only 27 cents, you know, at an overtime rate of pay would, you know, probably they would have gotten damages for a day or something. Maybe they only worked a week.

Q. I want to be clear on the—on the 3,344 people that you identified based on the Court's definition of the class in this case. Tell us again how many days someone had to work for the company to just get into the class of 3,344.

A. They had to have worked a gang time job for at least one shift within that specific period of time.

Q. All right. So we start off with a group under the Court's definition that's got some one-day people or two-day people or three-day people in it, correct?

A. Possibly, yes.

Q. And does that affect these low numbers?

A. It would.

Q. And how would it affect it to state the obvious?

[1376] A. Although if it was only one or two days, they wouldn't have gotten any damages at all because it wouldn't have gone into overtime because they had to work at least the week, to get damages they had to work some overtime so they would have had to work at least a week.

* * * *

[1384] Q. Okay. But did you ever look at—to see if, in fact, in most weeks they work 48 hours?

A. I did not—I did not look at that specifically, but based on the fact that only 200—what did we say—212 I think wouldn't get anything, I mean, that would mean

that most of them are working overtime or would be popped over into overtime.

* * * *

[1430] LONNY JEPSEN,

witness herein, called as a witness by the Defendant, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. PASCHAL:

Q. Good afternoon, Mr. Jepsen. Mr. Jepsen, could you tell us where you currently work?

A. Dakota Dunes at the Tyson Fresh Meats headquarters.

THE COURT: Would you pull closer to the microphone or pull them closer to you?

[1431] THE WITNESS: I work at Dakota Dunes at the Tyson Fresh Meats headquarters.

BY MS. PASCHAL:

Q. Where do you live?

A. About 20 miles south of Storm Lake, Iowa.

Q. Mr. Jepsen, what is your position for Tyson Fresh Meats?

A. I'm a director of human resource operations.

Q. How long have you held that position?

A. I've been serving in this role since 1996. We changed it to this title in about 2003.

Q. And could you please describe for us the duties of director of human resources?

A. My job is to oversee the HR functions in several of Tyson Fresh Meats facilities.

Q. Does that include the Storm Lake facility?

A. Yes, it does.

Q. How long have you had oversight of the Tyson Storm Lake facility?

A. Since I accepted this position in 1996.

* * * *

[1455] Q. I would like to call up Plaintiffs' 166 which is already in evidence. Mr. Jepsen, are you familiar with what is discussed in this document?

A. Generally, yes.

[1456] Q. And if we go to number two, if we could just highlight that, what does it mean that the amount of time will be calculated by minutes attached to each job code?

A. Like I explained earlier, there's a specific number of K-code minutes that are assigned to each one of the jobs on the production floor.

Q. Does this just say that it is going to be tied to—the K-code will be tied to the job code that you are assigned to for the day?

A. I believe that's what it means, yes.

Q. I would like to go down to item number seven, please. It says, "Working two shifts, A and B, will have time calculated for each shift individually." Then it says, "Currently K-code is paid only once per day." What does item number seven mean?

A. Occasionally we have people we call it working doubles, it might be an A shift team member who is going to stay and work some time on the B shift, it might be a B shift team member who comes in a little early to help out on the A shift. Prior to this change we only paid K-code one time per day. Okay. And so if you were working a double, for instance, you got it once and it looks like when we made this—what this indicates is when we made this change, now you'd receive it for both shifts.

Q. And since 2007 is that how the K-code has been applied, once per shift as opposed to once per day?

[1457] A. Yes, that's correct.

Q. Let's look at item number eight, please. Could you read number eight aloud for us?

A. "Minutes to pay will be determined by the job code on the first detail of each day or shift, excluding the setup code of 90C1."

Q. What does this mean?

A. There are a certain number of people that come in before the shift starts to help set up to make sure the sterilizers are—have hot water in them, to make sure that there's boxes for the day, just to make sure that things are prepared to—for production for the day, just help the supervisors. Those people start depending upon where you're at maybe a half hour, maybe an hour before the shift actually starts.

When they're doing their pre-shift activities, getting the floor started, the setup I should say, when they're doing the setup activities, they typically don't wear their safety equipment out to set up the floor so they'd go help the supervisors get the floor set up and when

the floor is ready to go, then they put their safety equipment on.

Q. Are they putting their safety equipment on on paid time?

A. Yes, because the setup people would be on the clock at that point.

* * * *

[1459] Q. If the company decided to change a K-code for a job at the Storm Lake plant, would you be involved?

A. Yes, I would.

Q. How?

A. Initially my involvement will be really just to determine if K-code is appropriate. I don't get involved in the number of minutes, it is just whether K-code is appropriate for that job. If it is appropriate, then the industrial engineer will do their study to determine how many minutes and then there's kind of a sign-off form where there's several signatures and I'd be one of the signatures and then once all the signatures are on there, then it goes to the HRIS group and they input it in the system.

Q. Is this process followed at the Storm Lake plant?

A. Yes.

Q. Are you familiar with a man named Jim Lehmkuhl?

[1460] A. Yes.

Q. Who is Mr. Lehmkuhl?

A. Jim is the team leader of the pork industrial engineers so he oversees the industrial engineers in the pork facilities.

* * * *

[1461] Q. Now, we have heard some testimony that some employees no longer received the K-code when it was changed in 2007. Is that an accurate statement?

[1462] A. Yes, it is.

Q. Do you know approximately how many employees?

A. Of the people that were already receiving K-code, about 70 percent continued to get four minutes and a lot of them ended up getting more.

Q. So it was the remainder of the 30 percent that no longer received the K-code?

A. That's correct.

* * * *

[1463] Q. Mr. Jepsen, why was the four minutes eliminated for employees who do not wear the special knife-related equipment?

MR. WIGGINS: Objection, Your Honor. No personal knowledge. He's—he was not the decision maker.

THE COURT: Overruled. Answer the question.

THE WITNESS: To answer that question, we've probably got to go back to when we implemented in the first place. Several years prior to 2007 we—we paid everyone that was associated with a department that got K-code four minutes and the reason that we did that was because we were working an eight-hour day.

When we initiated the four-minute K-code for everybody, we shortened the day to seven hours and 56 minutes and then people got four minutes of K-code so that was the eight hours of—or eight hours of pay.

When we made that decision to shorten the workday, we made a decision to allow people that didn't meet the criteria to [1464] continue to get the four minutes because if we didn't do that, they would in essence be taking a four minute per day pay cut and in Storm Lake where we work a lot of Saturdays, I mean, that could be 20 to 24 minutes so when we initiated the four minutes, we made a conscientious decision to allow the people that didn't meet the criteria to continue to get it so they wouldn't get a smaller paycheck.

* * * *

[1485] Q. Why is the clothes changing or K-code item for this paycheck all paid at the overtime rate?

A. Because he's already received 40 hours of straight time pay at the top. Anything after 40 is time—time and a half.

Q. We heard testimony earlier that the K-code is for pay purposes placed on the check on Saturday. Is that an accurate statement?

A. Yes.

Q. Since he had already worked 40 hours of production work by Saturday, is that why his K-code for the entire week was being paid at the overtime rate?

[1486] A. Yes.

* * * *

[1495] Q. In concept is assigning a time by which you're supposed to clock in and clock out and do all of your donning and doffing any different than paying K-code time?

A. That's what the K-code is. It is the amount of time that we expect you to do that pre and post-shift activity.

* * * *

[1498] Q. And you generally run about six days a week, don't you?

A. Generally, yes.

* * * *

[1517] Q. So you're paying four minutes flat rate based on an average, correct?

A. Prior to 2007 you were paid four minutes.

* * * *

[1522] Q. You can refer to your list that you used in your testimony yesterday if you need to; but you would agree that the rubber apron or plastic apron is not part of the four minutes, correct?

A. That's correct.

Q. And you would agree that the boots, we've got them sitting there on the table, they're not paid as part of the four minutes, are they?

A. That's correct.

Q. And the rubber gloves, they're not paid for as part of the four minutes, are they?

A. That's correct.

Q. And the cotton gloves, they're not paid for as part of the four minutes, are they?

A. That's correct.

Q. The white pants that you told us the company requires employees in kill to wear, you don't pay for them as part of the four minutes, do you?

A. I believe earlier it said light colored pants, not specifically white. Most people do wear white pants.

Q. The company—most people wear the company-issued white pants, correct?

A. Because we pay for it, yes; but if they choose to [1523] bring in a different pair, they can.

Q. If you bring in a different pair you will launder those for them overnight and put them in the laundry bag for them?

A. Usually, yes.

Q. The company requires the light colored or white pants to be worn every day in the kill department, correct?

A. Yes.

Q. That is not paid for as part of the K-code time, is it?

A. Prior to—based on this example, that's correct.

Q. This is not an example, these are—this is a list of things you pay for right there on the Stipulation, correct?

A. Based on this time frame, that's correct.

Q. I want to go over the four minute time frame. We will come to the next one in a minute. White pants—I mean white shirt, the company does not include that within the payment of the four-minute K-code, do they?

A. That's correct.

Q. The company does not include the frocks, it does not pay for the frock as part of the four minutes, does it?

A. That's correct.

Q. The company does not pay for the hair net as part of the four minutes, does it?

A. That's correct.

[1524] Q. It doesn't pay for the beard net or the hoodie, it has been called both, but it doesn't pay for that, does it, as part of the four minutes?

A. No, it does not.

Q. The company does not pay for the earplugs or earmuffs that it requires all employees to wear as part of the four minutes, does it?

A. We provide them. I mean, when you say we don't pay for them, everything you put up there we provide.

Q. Yes.

A. So yes, we actually do pay for the item; but as far as the time putting it on, that's no.

Q. That is not part of the four-minute pay that you are describing here in this Stipulation?

A. That's right.

* * * *

[1527] Q. Okay. Now, I want to ask you about another Stipulation you were shown. You were shown Stipulation 34 yesterday afternoon by Defendant's counsel. This says that on February 4th the company added its calculation of the walking time and you said you were familiar with that, correct?

A. Yes.

Q. And obviously the reason you added it is because you didn't pay it before then, correct?

A. Correct.

Q. And the walking time is that time that the company studied in 2006 or 7 on a walking time study that we have seen with prior witnesses, you are aware of that, aren't you?

A. Yes.

* * * *

[1528] Q. Okay. You can take it down. So we know that prior to February 4, 2007, that three minutes of walking and carrying time to the line and from the line back to the locker room every day was not paid for, was it?

[1529] A. I believe that would be correct.

* * * *

Q. My question was you would agree that food safety is paramount to Tyson's business?

A. Yes.

Q. And Tyson is in the business of producing a safe, wholesome, uncontaminated meat product, correct?

A. Yes.

Q. And that's for sale to its customers, correct?

A. Yes.

Q. And that's the source of Tyson's profits and ability to stay in business is selling uncontaminated meat to the public or to its customers, correct?

[1530] A. Yes.

Q. And that's the primary duty of every employee in the production room is to produce a safe, wholesome, uncontaminated meat product, correct?

A. That's the ultimate goal, yes.

* * * *

[1537] Q. That is when you do these donning and doffing, but you are paid regular time, not overtime, correct?

A. If you don't work more than 40 hours, then it is paid at regular time.

* * * *

[1560] JIM LEMKUHL,

witness herein, called as a witness by the Defendant, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. PASCHAL:

Q. Yes. Good morning, Mr. Lehmkuhl.

A. Good morning.

Q. Where do you live?

A. I live in Wakefield, Nebraska.

Q. Where are you employed?

A. I'm employed at Dakota Dunes, South Dakota.

Q. By whom?

A. Tyson Foods.

Q. Do you work at the corporate headquarters for Tyson Fresh Meats in Dakota Dunes?

[1561] A. I do.

Q. What is your position at Tyson Fresh Meats?

A. I'm group manager of industrial engineering for the Pork Division.

Q. How long have you worked for the company overall?

A. 15 years.

* * * *

[1562] Q. As pork group industrial engineering manager, what are you responsible for?

A. I'm responsible for the general oversight of—I have eight industrial engineers that report to me, seven at six of our pork plants, we have two actually in our Waterloo facility.

Q. Is the Storm Lake plant one of the plants that you oversee as the pork group industrial engineering manager?

A. Yes, it is.

Q. Does the Storm Lake industrial engineer report to you?

[1563] A. He does.

* * * *

[1564] Q. In general terms could you explain for us how the K-code changed in nature from being four minutes to being a range of minutes?

A. Two things happened. What we did was we added two walk components, a pre-shift walk component and a post-shift walk component, and we changed from paying flat to paying job specific, meaning each job actually got compensated for the specific equipment you were required to wear.

Q. You said there were two reasons, you made it job specific and was there a walking time addition as well?

A. Yes, we included a pre-shift walk time and a post-shift walk time.

MS. PASCHAL: I would like to call up the plant demonstrative, the first floor, please.

Q. Could you tell us specifically what walking time routes were added in 2007?

A. The routes that were added are highlighted in red and blue. The red was the kill wash station to the locker room, center of the locker room, and the blue was the kill—center of the kill floor to the locker room.

Q. So did the route that was measured from the locker room onto the floor differ from the route that was measured from the floor back to the locker room?

A. Yes.

Q. What was the difference?

[1565] A. Well, the post-shift included—the post-shift was from the center of the wash station to the center of the locker room and the pre-shift was from the center of the locker room to the center of the production floor.

Q. What accounts for that difference in the measuring points?

A. There was a walk component previously included in the four-minute study and that was from the—from the work station to the center of the wash station post-shift.

Q. So that was part of the four-minute K-code prior to the 2007 changes?

A. Yes.

Q. If we could just see the upstairs component of this map, please. Do you see that the blue and red lines continue on?

A. I do.

Q. Does the red line represent what was measured for post-shift walking in 2007 or for the 2007 changes?

A. Yes.

Q. And does the blue line represent what was measured that ultimately became part of the 2007 K-codes for pre-shift walk time?

A. Yes.

Q. Now, this example that we have just walked through is for the kill floor. Was a similar measurement done for the [1566] processing floor?

A. Yes, there was.

Q. Even though it is not represented on this particular diagram?

A. Correct.

Q. How was the walking time for these routes that we have just looked at measured?

A. What we did was determined the most common traveled path that all of the team members take and then what we used was a measuring wheel or like a rolling tape measure that measured a linear distance.

Q. Was this measuring wheel also referred to as a contractor's wheel?

A. Yes.

Q. Once you measured the linear distance, what did you do?

A. We took that standard and applied it toward an industry-accepted standard of 34 inches per step, I think it is approximately .648 seconds per step and just did the math.

Q. When you say an industry-accepted standard, is that an industrial engineering standard?

A. It is something you could just find in a general industrial engineering book, yes.

Q. Were these measurements of walking time pre and post-shift actually made at the Storm Lake facility?

[1567] A. They were.

Q. Who was involved in that process?

A. It would have been the industrial engineer there at the time.

Q. Were you managing that process at that time?

A. Yes.

Q. Was the Storm Lake industrial engineer reporting to you at that time?

A. Yes.

Q. What year were these measurements done that we have been looking at?

A. 2006.

Q. Did industrial engineering compile this walking time information anywhere or put it in any sort of document?

A. Yes, we did.

* * * *

[1577] Q. So looking along at these pieces of equipment that are under Pre-Shift Audited Activities, are these the items that are included in the K-code?

A. Yes.

Q. Do you see underneath each item there is a time associated with it?

A. I do.

Q. What does that represent?

A. That's the average time that we allow or they get to either don or doff that particular piece of equipment. In this case it would be to put on because it is pre-shift.

Q. And these average times that were calculated, is that something that the company's industrial engineering department did in 1998?

A. It is.

Q. And were these measurements that we're looking at under Pre-Shift Audited Activities and each particular item, were those measurements used to develop the four-minute K-code?

A. Yes, they were.

* * * *

[1588] Q. We talked about these measurements being performed in 1998. Do you have an understanding as to who within the company asked industrial engineering to make these measurements in 1998?

A. Yes, we were asked by the corporate legal department.

Q. What types of activities did the legal department ask industrial engineering to measure?

A. We were provided a list that was just on this spreadsheet that was provided to us and we were asked to study those items.

Q. What types of items are they, generally speaking?

A. I would consider those items unique to the meat industry.

[1589] Q. Would you—if I use the term specialized knife-related equipment, would you agree with that term?

A. Yeah, mesh gloves, cat cut gloves, arm guards, items like that.

Q. Were you asked to study items like the frock and the hard hat and earplugs?

A. No, we were not.

Q. Do you consider those unique items?

A. I do not.

Q. What do you consider those?

A. I mean, those are items that you can see in other industries so they would be, you know, more of a common or non-unique item.

Q. What were the original instructions given to industrial engineering regarding how to measure the activities that we just looked at?

A. The original instructions were to try to pick out one team member and follow them either pre-shift or post-shift throughout the whole process; but we really found that difficult to do just because, you know, everybody does it a little bit different in the mornings and post-shift, we had some steam issues, so we really had to go back to the drawing board as far as the first method.

Q. How did you adjust the process?

A. We went to just picking out specific pieces of [1590] equipment like an arm guard, we would position ourselves advantageously in the facility to where we could get as many observations and times as possible and so when they, for example, were coming off the floor to the wash station, they would be taking off their equipment and so then what we would do is just focus on that one piece of equipment and gather as many times as possible.

Q. So if it were, for example, a mesh glove, would you measure the mesh gloves over and over again?

A. Yes.

Q. Okay. Is the process that industrial engineering followed in 1998 to develop the K-code described in a document?

A. Described in a document?

Q. Yes.

A. Yes, it is.

Q. I would like to show Plaintiffs' Exhibit 15. Is this a document that you were referring to?

A. Yes, it is.

MS. PASCHAL: Your Honor, we move for admission of Plaintiffs' 15.

MR. WIGGINS: No objection.

THE COURT: Received.

BY MS. PASCHAL:

Q. Mr. Lehmkuhl, I would like for you to help us understand this document and walk us through it. If we could go [1591] to the top, and if we could—

MR. WIGGINS: I really should have said—

THE COURT: Turn your microphone on, please.

MR. WIGGINS: Same objection, but you have already overruled it so this is—this is 1998 at which he was not at the plant.

THE COURT: Overruled. It is received.

BY MS. PASCHAL:

Q. Mr. Lehmkuhl, could you read Section I(a) and then underneath it the first item?

A. "Spring 1998. Approached legal department with request to consider revamping current auditing protocol. Concerns were: Difficulty of measurement protocol, following individuals through the plant and into locker rooms was infeasible, made more difficult by beginning and end of shift confusion, many people making their way out at end of shift, many people socializing prior to and after shift. In addition, steam makes it difficult to see in the plant, and wash stations face the wall making timings difficult."

Q. Is this an explanation of what you just told us about the original protocol and why it could not be followed?

A. That's correct.

Q. Now, if we go to Section I(b), please. If you could start with Subsection 1, and then continuing on A and B.

A. "Divide activities into two categories. Items that [1592] are variable in time, and those that are not.

"Non-varying. Certain activities such as putting on and taking off safety gear should not vary, thus continued measurement is redundant absent a change in equipment."

Then B, "Varying. Certain activities like walking, waiting, and washing time, though currently measurable, should be actively monitored to ensure their time is minimized."

Q. I believe you just gave us an example of how you timed items such as the mesh glove. Did you make those measurements on the production floor, in the locker room, in certain areas of the plant?

A. Yeah, I mean, we didn't take timings in the locker room, but in pre-shift we would position ourselves at the entrance to the kill or cut floor because that's where a lot of team members would be putting on their equipment and post-shift we would locate ourselves close to the wash sinks because as team members approached, they would be removing the stuff.

Q. Why didn't you measure in the locker room?

A. We didn't need to get—to get the times that we needed and then, you know, also it is a personal space. There's restrooms in there.

Q. Were you able to get enough timings, for example, donning a mesh glove or donning a mesh apron by measuring on the production floor or outside the locker room?

A. Yes.

[1593] Q. You just read to us two sentences about varying and non-varying activities. Could you explain to us what the difference is?

A. Start with varying in activities and, you know, as described here, it can be walking, waiting, and the reason they vary is because one example is there's several wash stations in the facility and, you know, if we're having a plumbing issue, some wash stations are down, that would change their time that they wait or to wash their equipment so those times are going to vary.

Q. How does that contrast with non-varying activities?

A. Non-varying is exactly what it says, you know, putting on a mesh glove today should be the same amount it takes to put it on 10 years ago. It is not just going to vary.

Q. Now, if we look at the next sentence under B2, could you read for us this sentence?

A. "Conduct a comprehensive baseline audit in nonunion plants of audited activities to come up with an overall average time for compensable activities."

Q. Is what you just described for me in terms of industrial engineering going out into the plant on the production floors, measuring donning and doffing activities, part of what is just described in number two?

A. Yes.

Q. Did you also measure washing time?

[1594] A. Yes.

Q. Did you also measure the wait to dip time?

A. Yes.

Q. Did you also measure the dipping time?

A. Yes.

Q. Did you also measure the walk time from the work station to the wash station post-shift?

A. That was included, yes.

Q. This says compensable activities. Does that refer to the types of activities that we just discussed?

A. Yes.

* * * *

[1599] Q. And could you just explain to us or paint a picture for us of how these timings were actually done inside the plant?

A. For example, like I said earlier, the industrial engineer would locate themselves in the facility where they would be able to get the most observations so a good example would be post-shift locating themselves by the wash station where several would be coming off the floor, removing their equipment, preparing to wash it.

* * * *

[1600] Q. You referred to the industrial engineers using a stopwatch to perform the measurements. Can you just give us a very simple explanation of how they would do that, say a person walks by and is donning an item?

A. As a person walks by and they're donning an item, it was really just a very simple time study. When the IE determined that they started the process, they'd start their [1601] watch and when the industrial engineer determined they were done with the process, they would stop the watch.

Q. Would they record that time?

A. And then record that time.

Q. What if one of the people you were timing seemed to be performing a task particularly slowly? Would you disregard that time?

A. No, I mean, not unless it was—there was like an obvious stop and they were talking to somebody else, you know, then that time would be, you know, really not relative; but most generally we—we took everybody that came by.

Q. And so that would include both fast and slow people?

A. Exactly.

Q. Let's go now to Subsection E. Could you read for us that statement, please?

MS. PASCHAL: Actually I think we are on the next page.

BY MS. PASCHAL:

Q. Could you read that please?

A. "On the basis of the timings conducted, an average time to complete each task was calculated at each plant."

Q. If you could read F as well.

A. "At each plant, each knife-carrying position was listed with relevant tasks associated with such jobs listed. The average time per task calculated under E was included as the [1602] individual times associated with each task and the total time associated with all tasks performed by each knife-carrying position was calculated."

Q. So, for example, after an industrial engineer got a certain number of observations for donning a mesh glove, what was done with those observations?

A. Those—those times were averaged.

Q. Was the resulting average then the average for a Storm Lake don glove?

A. Yes.

Q. What was the next step?

A. The next step was to really apply those times for all of these activities that we're talking about to each individual job or specific work code to come up with a total time.

Q. So once you had an average for a plant for a particular item, did you then look at what other plant averages for that same item were?

A. Yes.

Q. And what did you do with those data?

A. We then averaged those all together across the nonunion plants and that's how we came up with the 3.8 minutes.

Q. So, for example, you have—for Storm Lake you have developed—as I understand it you developed a number that was average of don a mesh glove?

A. Yes.

[1603] Q. Was that number then averaged with every other plant's average don mesh glove time?

A. Correct.

Q. And then you mentioned those averages being applied by position?

A. Correct.

Q. And how was that done?

A. That was actually done with a weighted average. We, for example, if you had 10 people in the plant that performed that activity, you count it 10 times versus if you had one plant it would count once so we came up with a total weighted average for each plant and then as I said earlier, then we went and averaged those again across all the nonunion plants.

Q. Now that you have had your average across all your plants for a mesh glove, you then made an average for each position, is that accurate?

A. Yes.

Q. And then you explained there was a weighted average across each position to get a plantwide average?

A. Correct.

Q. After you developed a plantwide average, what was the next step?

A. The next step like I described earlier is we averaged all of those waited averages for each plant across the nonunion plants to come up with the total 3.8 minutes.

[1604] Q. What did you do with the 3.8 total?

A. We rounded it up to four.

Q. Did that become the four-minute K-code?

A. It did.

MS. PASCHAL: If we could turn to the page that is Bates labeled at the bottom TSE 00194650. That's it. Thank you. If we could call out that top box, please.

Q. What is this a summary of?

A. That's the summary of the weighted average of all of the beef and the pork plants, nonunion.

Q. Do you see where Storm Lake is listed?

A. I do.

MS. PASCHAL: Could we highlight that, please, Connie?

Q. Do you see that 3.357 number?

A. I do.

Q. What does that represent?

A. That represents the summation of their total time for the Storm Lake facility.

Q. So is that the plantwide average for Storm Lake?

A. Yes.

Q. How does that compare with the average of all plants?

A. It's less.

Q. Where is the average for all plants on this chart?

A. At the very bottom it says Weighted Average, 3.8.

Q. And then that was rounded up?

[1605] A. To four minutes, correct.

Q. So is the four-minute K-code that was implemented in 1998 higher than what the actual calculated average for the Storm Lake plant was?

A. Yes, it is.

* * * *

[1619] Q. All right. Now, these items listed on the board there, for the record they are rubber or plastic apron, boots, white shirt, white pants, frock, hair net, beard net, earplugs, and muffs, those were never studied even in 1998, were they?

A. Those were not on our list of items to study, correct.

Q. Because you looked at just the things the lawyers told you to look at, correct?

A. That's correct.

Q. And they didn't put these on the list to be studied, did they?

[1620] A. They did not.

Q. These items have never been audited or studied since 1998 either, have they?

A. They have not.

* * * *

[1621] Q. Okay. At that time in 2006 you once again studied only what the lawyers told you to study, correct?

[1622] A. Correct.

Q. So in 2006 once again, you did not study any of these items on the board that I have read out to you, have you, did you?

A. No.

Q. You didn't study any of the items in Stipulation No. 25 in 2006, did you?

A. Not in 2006, no.

* * * *

[1624] Q. When you—when employees are putting on the items on the board, the apron, boots, rubber gloves, cotton gloves, white pants, white shirt, frock, hair net, beard net, they do that in combination?

A. Yeah, I think everybody has their own method of donning.

Q. And they do those items in combination with the mesh apron, belly guard, steel, scabbard, mesh glove, Polar glove, Polar sleeve, Plexiglass arm guard, mesh sleeve, membrane skinner glove?

A. Yes.

Q. It is an ensemble?

A. I would agree.

Q. In order to understand how long it takes to do that ensemble or that motion of putting on and taking off, shouldn't you study the whole set of activities?

A. Those weren't our instructions. Our instructions were to study a certain list of equipment and that's what we completed.

Q. I recognize that on this study that's the way it was done, but my question is a little different. Shouldn't you—shouldn't a time study, if you are going to do it yourself, if [1625] you were given the freedom to do it yourself, to apply your own expertise, don't—

MS. PASCHAL: Objection. Foundation. Mr. Lehmkuhl is not being offered as an expert witness.

THE COURT: Overruled.

BY MR. WIGGINS:

Q. If you were given the freedom to exercise your expertise and your education, wouldn't you agree that

to time these activities you really need to look at them in combination?

A. I mean, I agree. If I wanted to time all of those things, then yes.

* * * *

[1631] Q. Let me just ask you the question first. These [1632] activities in 1998, they were videotaped, weren't they?

A. I believe some of them were, yes.

Q. And we've not been shown any of the videotapes from the 1998 study, have we?

A. No.

Q. That would tell us if you were staging the activities and where they were staged, correct?

A. Potentially, yes.

Q. And that would tell us which activities were done in a conference room, if any, and which were done in the place that it is normally done, correct?

A. It may. I mean, if that's what was videotaped.

Q. Now, you were shown Exhibit—where is the list with the counts on it? You were shown the spreadsheet that had various things on it. Do you remember that?

A. Yes, sir.

Q. Exhibit 320. Can you bring that up? While he is bringing that up, the activities that were looked at either in a conference room or in the hallway or wherever, you used a few employees, sometimes one, sometimes two or three, maybe four people at your Madison plant, correct?

A. As I testified earlier, we got as many times as we could.

Q. But they were small samples of one, two, or three or four people, weren't they?

[1633] A. Could have been, yes.

Q. And some of them were supervisors, correct?

A. Again, I don't remember exactly if that was the case.

Q. But you did testify in your deposition it was a combination of supervisors doing the role playing and employees, didn't you?

A. I said that was a possibility.

Q. The protocol did not prohibit that, did it?

A. No.

Q. All right. Now, look at the bottom of that page that you were shown, if we can look at the line called Count. Go down a little bit further. Is this the exhibit? It doesn't look the same. Here we go. There. You see that row at the bottom called Count?

A. I do.

Q. And that is telling us how many people were done for all 11 plants, correct, one of which is Storm Lake?

A. Yes.

Q. So in the category of two shin guards for 11 plants, you had eight people total for all 11 plants, correct?

A. Yes.

Q. The next category, mesh apron, you had only 16 people spread across 11 plants, correct?

A. Yes.

Q. The next column, legging apron, you had only eight [1634] people spread across 11 plants, correct?

A. Yes.

Q. That's less than one per plant with your sample size, wasn't it?

A. Yes.

Q. The next column, belly guard, you had only nine people studied spread across 11 plants which was less than one per plant, correct?

A. I mean, that just doesn't seem right to me. I need to back up because I specifically took more measurements than that in Madison so I can't testify for sure exactly what count means.

Q. You have no idea of the sample size at Storm Lake, do you?

A. I don't.

Q. Did you bring any records here today of the Storm Lake study?

A. As far as the raw data and the—

Q. Anything at all that would touch upon the Storm Lake study from 1998.

A. I don't have anything on my person, no.

Q. You would agree that everything you have been shown so far was at the corporate level for all 11 plants, correct?

A. A summary, yes.

Q. Now, we have had tapes shown a good bit in this trial from a Dr. Mericle. Are you familiar with the fact that he [1635] videotaped activities at the Storm Lake plant?

A. Yes.

Q. Have you looked or studied any of those tapes?

A. I have not.

Q. Have you performed any statistical tests?

A. No.

Q. As I understand how you did this, you would just take the first employee that would present themselves to you coming out of the locker room and you'd pick them? Just how did you pick the samples?

A. It was random. I mean, as I described earlier, we would locate ourselves in a location of the plant where we felt there was going to be a lot of traffic, as I have mentioned several times earlier like post-shift we would be by the wash stations because team members would be taking off their equipment and so we were able to get several times there.

Q. Okay. So what—you say it was random?

A. It was random.

Q. And what you mean by that is you'd have a group of people coming at you and you would pick one, correct?

A. Pick one, correct.

* * * *

[1637] Q. Does each plant have its own industrial engineer?

A. They do and Waterloo has two as I described earlier.

Q. Then corporate, it has some more industrial engineers at the corporate level?

A. Yes.

[1638] Q. How many?

A. One over the pork side and then one over the beef side and then there's a senior industrial engineer that reports to each of us at Dakota Dunes.

Q. A senior what?

A. Industrial engineer that reports to us at Dakota Dunes.

Q. Somewhere, 10 or 12 industrial engineers at the Tyson Fresh Meats Division?

A. Approximately, yes.

* * * *

[1677] TRANSCRIPT OF PROCEEDINGS, held before the Honorable John Jarvey, at the Federal Courthouse, Sioux City, Iowa, commencing at 8:17 a.m., September 23, 2011, reported by Linda Faurote-Egbers, Certified Shorthand Reporter and Notary Public for the State of Iowa.

* * * *

[1680]THE COURT: The record can reflect that we are outside the presence of the jury on what appears to be the final morning of trial. It is my understanding that the Defendant will rest shortly after we begin this morning. The Court receives over objection Exhibit D 2013. The primary issue in this case is authentication and the last witness who came here last evening, Mr. Lehmkuhl, certainly did that, although in part by

circumstantial evidence. I cite United States versus Estrada, 583 F3d, 669, a Ninth Circuit case from 2009. I thought there was also a very instructive case from the Fourth Circuit, the Miller case from the Fourth Circuit on that issue.

The parties indicated to me yesterday that perhaps they would be willing to make their record concerning the final jury instructions this morning, even though the proof is not technically closed yet. Obviously if something happens in the next hour, whenever we finish with evidence today, you retain the right to supplement your record in that regard; but we might as well get this done now.

We have had I think three sessions outside the presence of the jury, but none of them were on the record and so this is the opportunity you have to make your record concerning the jury instructions. Mr. Wiggins, let's start with you.

* * * *

[1689] THE COURT: Mr. Mueller?

MR. MUELLER: Defendant does not have any objections to the instructions or the Verdict Form. If you want comment on anything Mr. Wiggins just argued, I am happy to answer your questions.

* * * *

[1718] THE COURT: Please be seated. We are going to have the closing arguments of the lawyers. You will recall from my preliminary instructions that the closing arguments in the case are not evidence. The evidence is done. This is an important part of the trial, it is that opportunity that the lawyers have to attempt to persuade you that their clients' position is the [1719] one that you should adopt in your deliberations. I think I

told you yesterday that I have given each side as much as 90 minutes to make their closing argument. Mr. Wiggins, of course, will go first, then Mr. Sapp will go second so that Mr. Sapp can comment on Mr. Wiggins' opening statement and then if Mr. Wiggins saves some of his time, he can make rebuttal argument so that he can comment on Mr. Sapp's argument.

With that, Mr. Wiggins, you may make the Plaintiffs' closing argument.

* * * *

[1748] MR. WIGGINS: Let's be clear. I've told you that the damages are on Exhibits 345 and 346. They range from $50 for various people up to $9,300 is the highest. That's for the—all the activities together. Exhibit 346 breaks out the three minutes for the walking time claim and we ask you to use that as a way of answering about the break time.

In other words, on the break time claim line you will put what the number is on Exhibit 346 and you will subtract from the 6.6 total, 6.6 million total on Exhibit 345 for the other activities so the damages we're asking you to fill in on the Special Verdict Form are for the pre and post-shift $6.6 million and some odd change that's on Exhibit 345 minus the amount—the 415,000 or so on Exhibit 346 and then put that three—Exhibit 346 amount on the second line for the break time.

Let me give you the exact amounts. You will have these exhibits back there, but these are the exhibits I am talking about. Exhibit 345 is the first line and it's got all the individuals listed and their amounts, this is pretax amounts, no interest, that's just the raw backpay, and it says, $6,686,082.36 and we are asking you to award that based on Exhibit 345 to the people listed minus what is on this Exhibit 346, $413,434.71 and

that you put that amount on the second line so it is Exhibit 345 on the first line minus this 413,000 and then put the 413 back in on the second line. That's our—that's what we are asking you as a result of the evidence in [1749] this case. Thank you.

* * * *

[1818] THE COURT: Please be seated. * * * *, I assume that because you are holding the Verdict Form that you must be the foreperson.

* * * *: Yes.

THE COURT: Yes. Has the jury reached a verdict?

* * * *: Yes.

THE COURT: Yes. Is it unanimous, meaning do all the jurors agree to it?

* * * *: Yes.

THE COURT: Yes. Ms. Clerk, please get the Verdict Form. In the matter of Peg Bouaphakeo and others versus Tyson Foods Incorporated, Question No. 1: "Did the Plaintiffs prove that the time spent donning and doffing hard hats, work boots, hair nets, frocks, aprons, gloves, whites, and earplugs is work [1819] within the meaning of the Fair Labor Standards Act?" Answer, "Yes."

Question No. 2, "Did the Plaintiffs prove that donning and doffing the items in Question No. 1 is integral and indispensable to the employees' gang time work?" Answer, "Yes."

Question No. 3, "Is the meal break a bona fide meal period?" Answer, "Yes."

Question No. 4, "Are the donning and doffing activities at issue in this case de minimis as that term is defined in Instruction No. 6?" "No."

Question No. 5, "Did the Plaintiffs prove that they're entitled to additional compensation for any of the donning and doffing activities at issue in this case?" "Yes."

"If yes, indicate how much for the following activities, each activity. Before and after shift, $2,892,378.70."

"During the meal period, zero," because they found it was a bona fide meal period for a total of $2,892,378.70.

The Verdict Form is signed by the foreperson and by all other seven jurors. The Clerk of Court shall file the Verdict Form and enter Judgment accordingly.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. 5:07cv04009-JAJ

PEG BOUAPHAKEO, MARIO MARTINEZ, JAVIER FRAYRE, HERIBENTO RENTERIA, JESUS A. MONTES, and JOSE A. GARCIA, individually and on behalf of others similarly situated,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

FINAL INSTRUCTIONS TO THE JURY

INSTRUCTION NO. 1

INTRODUCTION / DUTIES / BURDEN

MEMBERS OF THE JURY:

Now that you have heard the evidence, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence.

Counsel will quite properly refer to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the Court in these instructions, you of course are to be governed by the instructions.

You are not to judge the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

Whenever a party must prove something, they must do so by the preponderance of the evidence. Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

The fact that the defendant in this lawsuit is a corporation should not affect your decision. All persons are equal before the law and corporations are entitled to the same fair and conscientious decision by you as any other person.

INSTRUCTION NO. 2

EVIDENCE

You shall base your verdict only upon the evidence and these instructions. The "evidence" in this case consists of the testimony of witnesses, the documents and other things received as exhibits, and the facts that have been stipulated. The parties have stipulated or agreed that certain facts are true. You must therefore treat those facts as having been proved.

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide. The following are not evidence: (1) statements, arguments, questions and comments by the lawyers; (2) objections and rulings on objections; and (3) anything that you saw or heard about this case outside the courtroom.

You will decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable. In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witness's testimony. There are many factors which you may consider in deciding what testimony to believe, for example: (1) whether the testimony is reasonable and consistent with other evidence you believe; (2) the witness' appearance, willingness and ability to answer questions, conduct, intelligence, memory and knowledge of the facts; (3) whether the witness has given statements in the past that are inconsistent with his or her testimony at trial; and (4) the witness' interest in the trial, their motive, candor, bias and prejudice.

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

Expert Witness

You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all other evidence in the case.

Representative Evidence

The named plaintiffs bring this case on behalf of themselves and others. In order for non-testifying members of the class to recover, the evidence must

establish that they suffered the same harm as a result of the same unlawful decision or policy. You may not award damages to non-testifying members of the class unless you are convinced by the preponderance of the evidence that they have been underpaid.

Both parties have presented various types of evidence, including stipulations of fact, documents and live testimony of hourly employees, supervisors, experts, and video clips. Not all affected employees need testify for plaintiffs to prove their claims. Rather, if some employees testify about the activities they performed or the amount of unpaid time they worked, other non-testifying employees who performed substantially similar activities are deemed to have shown the same thing by inference. This kind of evidence called [sic] "representative evidence."

There is no bright-line rule as to the percentage of representative employees necessary; rather, the weight to be accorded the evidence is a function not of its quantity, but of its quality – whether the testimony covers similarly situated workers, and is generally consistent. You may also consider whether the witnesses who testified worked in or with similar positions and similar departments as the non-testifying employees, whether they wore similar sanitary and protective items, whether the testifying employees performed donning and doffing activities similar to non-testifying employees, whether the witnesses who testified had the opportunity or ability to observe the non-testifying employees, and whether there was evidence presented that either was consistent with or was inconsistent with the testimony of the testifying witnesses. The representative evidence, as a whole, must demonstrate that the class is entitled to recover.

INSTRUCTION NO. 3

SUMMARY OF CLAIMS

This is a civil case brought by plaintiffs, on behalf of themselves and other individuals similarly situated as plaintiffs, against the defendant, Tyson Foods, Inc.

Plaintiffs bring their lawsuit pursuant to the Fair Labor Standards Act, referred to in these instructions as the "FLSA" and the Iowa Wage Payment Collection Act. Under both the FLSA and the Iowa Wage Payment Collection Act, an employer must pay overtime compensation in any workweeks in which an employee has more than 40 "hours worked," as defined in Instruction No. 4. Overtime compensation must be paid at a rate at least one and a half times the employee's regular rate of pay for all hours worked in excess of 40.

First, plaintiffs claim that the donning and doffing of hard hats, work boots, hair nets, frocks, aprons, gloves, whites, and ear plugs constitutes compensable "work." Defendant denies that such activities constitute "work" as defined in the FLSA and contends that it is not liable for it because the activity is "preliminary" and "postliminary" activity and because it is "de minimis" or miniscule.

Second, plaintiffs claim that they are entitled to compensation during their meal period because they donned and doffed clothing and cleaned equipment during this time. Defendant claims that plaintiffs' meal break donning and doffing is not compensable because it is a "bona fide meal period."

Finally, the plaintiffs claim that the amount of compensation paid by the defendant for non-gang time activities was inadequate (whether that be for the

items in their first claim or the items for which "K-Code" has been paid). Defendant contends that it has fully compensated plaintiffs for all such activities. You will decide whether the amount paid by the defendant for these activities fully compensated the plaintiffs.

You are instructed that when an employer knows or has reason to believe that "work" under the FLSA is being performed, it is the responsibility of the employer to compensate employees for such work, even if that work was not specifically requested by the employer to be performed. An employer cannot sit back and accept the benefits of such work without compensating employees for it. It is the duty of management to exercise control and make sure that work is not performed if it does not want it to be performed.

You are further instructed that employees cannot waive their rights under the FLSA. This means that an employee does not lose any right he or she may have to back wages by failing to complain to his or her employer or by any other action.

The plaintiffs in this case make no claim for the time that they were actually on the production line handling the meat at the Storm Lake facility, also known as "gang time." Basing hourly pay in whole or in part on gang time is permissible and the legality of "gang time" is not at issue in this case.

INSTRUCTION NO. 4

FAIR LABOR STANDARDS ACT ELEMENTS

Your verdict must be for plaintiffs and against defendant on plaintiffs' FLSA claim if all of the following elements have been proved. The plaintiffs must prove:

First, plaintiffs were employed by the defendant during the time period involved;

and

Second, defendant failed to pay plaintiffs overtime pay for all hours worked by plaintiffs in excess of 40 in one or more workweeks.

INSTRUCTION NO. 5

FAIR LABOR STANDARDS ACT - DEFINITIONS

Hours Worked

The first issue you will have to decide is whether donning and doffing hard hats, work boots, hair nets, frocks, aprons, gloves, whites, and ear plugs are "work" within the meaning of the FLSA. The phrase "hours worked" as used in Instruction No. 4 includes all time spent by an employee that involves physical or mental exertion (whether burdensome or not), controlled or required by, and done primarily for the benefit of the employer or the employer's business. Such time constitutes "hours worked" if the employer knew or should have known that the work was being performed. When deciding whether an activity is work, it makes no difference how easy or difficult the activity is. Periods during which an employee is completely relieved of duty that are long enough to enable the employee to use the time effectively for his or her own purposes are not "hours worked."

Portal-to-Portal Act – Preliminary and Postliminary Activities

The Portal-to-Portal Act is part of the FLSA. It is an exception to the general rule that an employer must pay for all hours worked. It provides that employers are not required to pay overtime for activities which

are preliminary to (before) an employee's first "principal activity" of the day or postliminary to (after) an employee's last principal activity of the day.

A "principal activity" is any work that is both integral and indispensable to the production work for which the employee is employed. To determine whether an activity is integral and indispensable, you must find that (1) the activity is required by the employer; (2) the activity is necessary to the employee's principal activities; and (3) it is for the primary benefit of the employer. When integral and indispensable activities occur pre-shift or post-shift, only the time reasonably spent is compensable.

Continuous Workday

The continuous workday is the period between the commencement and the completion on the same workday of an employee's principal activity or activities.

In general, an employer is required to compensate its employees for their time, beginning when the employee performs the first principal activity of the workday. Pre and post shift activities that are work and that are integral and indispensable to the production work performed by employees are considered principal activities. Only time reasonably spent after the employee engages in the first principal activity and before the employee finishes his or her last principal activity is part of a continuous workday and is compensable under the FLSA.

Walking Time

You are also instructed that an employees' activities including walking time to their department at the start of a shift and the return from their department

at the end of a shift, is compensable when it either follows the first principal activity or first activity that is integral and indispensable to a principal activity or comes before the last principal activity or activity that is integral and indispensable to a principal activity.

Bona Fide Meal Periods

Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be relieved from duty for the purpose of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period.

The plaintiffs have the burden to prove that they are entitled to mealtime compensation. Whether an employee is entitled to mealtime compensation depends on whether the meal period as a whole was spent "predominantly for the benefit of the employer" or whether the employee was able to use the meal period effectively for his or her own purposes. The continuous workday described above does not include time spent during a bona fide meal period. A meal period that is interrupted by work is only compensable if the interruption causes employees to spend their meal period primarily for the benefit of the employer.

Short Breaks

The FLSA does not require an employer to provide an employee with breaks during the workday. However, you have heard evidence that Tyson provides its employees with a paid 15 minute break. Payment for the time employees are on these breaks cannot offset any damages for uncompensated "work."

INSTRUCTION NO. 6

DE MINIMIS

Defendant is required to pay for all compensable work unless it proves by a preponderance of the evidence that the work is what is referred to as "de minimis" or minuscule. The defendant contends that even if the donning and doffing of items at issue in this case constitutes "work," it is not compensable because it occupies such a short period of time.

The "de minimis" rule is concerned with the practical administrative difficulty of recording small amounts of time for payroll purposes. Employers must compensate employees for even small amounts of time, unless the time is so minuscule that it cannot as a practical administrative matter be recorded for payroll purposes. When deciding whether time is "de minimis," all of the compensable time that was not paid during the day, including walking time, should be added together and you should also consider the aggregate size of the claim as a whole.

The following factors are considered in determining whether work activities are "de minimis":

(1) The practical administrative difficulty of recording the uncompensated time;

(2) The aggregate amount of uncompensated time; and

(3) The regularity of the uncompensated work.

Defendant must prove this defense by a preponderance of the evidence.

There is no precise amount of time that may be denied compensation as "de minimis." No rigid rule

can be applied with mathematical certainty. Rather, common sense must be applied to the facts of this case.

INSTRUCTION NO. 7

IOWA WAGE PAYMENT COLLECTION LAW

The Iowa Wage Payment Collection Law is a law of the State of Iowa. The Iowa Wage Payment Collection law is meant to facilitate the public policy of allowing employees to collect wages owed to them by their employers.

For purposes of this trial, plaintiffs' claims under the Iowa Wage Payment Collection Law are duplicative of their claims under the FLSA. Although the Iowa claim applies to a larger number of employees and a shorter period of time than the federal claim, the elements of the Iowa claim, that is, what the plaintiffs must prove, are the same as the federal claim.

INSTRUCTION NO. 8

DAMAGES GENERALLY

If you find in favor of the plaintiffs on one or more of their claims, then the plaintiffs are entitled to recover damages. Keep in mind that in determining damages, you must use your sound judgment based upon impartial consideration of the evidence. The amount you assess for any item of damage must not exceed the amount caused by the opposing party as proved by the evidence. In awarding damages, you must not engage in speculation, guess or conjecture. The damages must also have a reasonable basis in the evidence, but need not be proven with precision. Also, your judgment must not be exercised arbitrarily or out of sympathy or prejudice for or against the parties.

QUOTIENT VERDICT

In arriving at an item of damage you cannot arrive at a figure by taking down an estimate of each juror as to an item of damage, and agreeing in advance that the average of those estimates shall be your item of damage.

FLSA DAMAGES

With respect to plaintiffs' first claim, that is, the compensability of donning and doffing standard or non-unique sanitary items, if you find that plaintiffs have proven their claim, and that the defendant has failed to prove that the plaintiffs' donning and doffing of standard sanitary items was *de minimis*, then you must turn to the question of damages.

With respect to plaintiffs' second claim, the compensability of time spent during the meal period donning, doffing, and sanitizing clothing and equipment, if you find that the plaintiffs have proved their claim, and that it was not a bona fide meal period, then you must turn to the question of damages.

Finally, with respect to plaintiffs' final claim, the adequacy of the compensation paid for donning, doffing, and sanitizing clothing and equipment, if you find for plaintiffs on this claim, and the defendant has not proved its *de minimis* defense, then you must turn to the question of damages.

The law requires employers to make and keep records of wages, hours, and conditions of employment but it does not require employers to use time clocks. If the employer does not keep records of the amount of time spent on the activities at issue, plaintiffs carry their burden to prove damages if they prove that the employees have in fact performed work for which they

were not paid and produce sufficient evidence to show the amount and extent of such work as a matter of just and reasonable inference.

The burden then shifts to the defendant to come forward with evidence of the precise amount of uncompensated work performed or with evidence to negate the reasonableness of the inference to be drawn from plaintiffs' evidence. If the defendant fails to produce such evidence, you may then award damages to the employees even though those damages will only be approximate.

Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages. If you find that such compensation was not sufficient to cover all of the activities at issue, all uncompensated work should be taken into account in calculating damages.

Again, the overtime compensation amount that should have been paid is the number of hours worked in excess of 40 hours in each workweek, times one and one-half the regular rate for the workweek.

In determining the amount of damages, you may not include or add to the damages any sum for the purpose of punishing defendant.

INSTRUCTION NO. 9

DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone – including me – how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. Your verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be – that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you each [sic] in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the court

security officer that you are ready to return to the courtroom.

DATED this 23rd day of September, 2011.

/s/ John A. Jarvey
JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. 5:07cv04009-JAJ

PEG BOUAPHAKEO, MARIO MARTINEZ, JAVIER FRAYRE, HERIBENTO RENTERIA, JESUS A. MONTES, and JOSE A. GARCIA, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

TYSON FOODS, INC.,

Defendant.

RESPONSE TO JUROR QUESTION

MEMBERS OF THE JURY:

I have received a note signed by one juror, a copy of which is attached. In your note, you ask the following question:

> If we find for the plaintiff, can we award a lesser amount or is the case strictly for specified amount?

In response to your note, I state the following:

> Please proceed to elect a foreperson and discuss these matters among yourselves. Your question is answered in the first paragraph of Instruction No. 8.

DATED this 23rd day of September, 2011.

/s/ John A. Jarvey
JOHN A. JARVEY
U. S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. 5:07cv04009-JAJ

PEG BOUAPHAKEO, MARIO MARTINEZ, JAVIER FRAYRE, HERIBENTO RENTERIA, JESUS A. MONTES, and JOSE A. GARCIA, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

TYSON FOODS, INC.,

Defendant.

VERDICT FORM

Question No. 1

Did the plaintiffs prove that the time spent donning and doffing hard hats, work boots, hair nets, frocks, aprons, gloves, whites, and ear plugs is "work" within the meaning of the FLSA? (See Instruction No. 5, page 10.)

Yes ✓ No ___

(If your answer to Question No. 1 is "NO," do not award damages for donning and doffing these items and proceed to Question No. 3.)

Question No. 2

Did the plaintiffs prove that donning and doffing the items in Question No. 1 is "integral and indispensable" to the employees' gang-time work? (See Instruction No. 5, page 10.)

Yes ✓ No ___

(If your answer to Question No. 2 is "NO," do not award damages for donning and doffing these items.)

Question No. 3

Is the meal break a bona fide meal period? (See Instruction No. 5, pages 11-12.)

Yes ✓ No ___

(If your answer to Question No. 3 is "YES," do not award damages for activity occurring during the meal period.)

Question No. 4

Are the donning and doffing activities at issue in this case "de minimis" as that term is defined in Instruction No. 6? (See Instruction No. 6, page 13.)

Yes ___ No ✓

(If your answer to Question No. 4 is "YES," do not answer Question No. 5.)

Question No. 5

Did the plaintiffs prove that they are entitled to additional compensation for any of the donning and doffing activities at issue in this case?

Yes ✓ No ___

If the answer to question No. 5 is "YES," indicate how much you award for each activity:

Before and After Shift	$ 2,892,378.70
During the Meal Period	$ 0
Total	$ 2,892,378.70

Date: Sept. 28, 2011

_____
Foreperson

_____
Juror

_____
Juror

_____
Juror

_____
Juror

_____
Juror

_____
Juror

_____
Juror